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# THE RIGHT TO PRIVACY.

> "It could be done only on principles of private justice, moral fitness, and public convenience, which, when applied to a new subject, make common law without a precedent; much more when received and approved by usage."
>
> WILLES, J., in Millar *v.* Taylor, 4 Burr. 2303, 2312.

THAT the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses *vi et armis*. Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life,—the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession — intangible, as well as tangible.

Thus, with the recognition of the legal value of sensations, the protection against actual bodily injury was extended to prohibit mere attempts to do such injury; that is, the putting another in

fear of such injury. From the action of battery grew that of assault.[1] Much later there came a qualified protection of the individual against offensive noises and odors, against dust and smoke, and excessive vibration. The law of nuisance was developed.[2] So regard for human emotions soon extended the scope of personal immunity beyond the body of the individual. His reputation, the standing among his fellow-men, was considered, and the law of slander and libel arose.[3] Man's family relations became a part of the legal conception of his life, and the alienation of a wife's affections was held remediable.[4] Occasionally the law halted,— as in its refusal to recognize the intrusion by seduction upon the honor of the family. But even here the demands of society were met. A mean fiction, the action *per quod servitium amisit*, was resorted to, and by allowing damages for injury to the parents' feelings, an adequate remedy was ordinarily afforded.[5] Similar to the expansion of the right to life was the growth of the legal conception of property. From corporeal property arose the incorporeal rights issuing out of it; and then there opened the wide realm of intangible property, in the products and processes of the mind,[6]

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[1] Year Book, Lib. Ass., folio 99, pl. 60 (1348 or 1349), appears to be the first reported case where damages were recovered for a civil assault.

[2] These nuisances are technically injuries to property; but the recognition of the right to have property free from interference by such nuisances involves also a recognition of the value of human sensations.

[3] Year Book, Lib. Ass., folio 177, pl. 19 (1356), (2 Finl. Reeves Eng. Law, 395) seems to be the earliest reported case of an action for slander.

[4] Winsmore *v.* Greenbank, Willes, 577 (1745).

[5] Loss of service is the gist of the action; but it has been said that "we are not aware of any reported case brought by a parent where the value of such services was held to be the measure of damages." Cassoday, J., in Lavery *v.* Crooke, 52 Wis. 612, 623 (1881). First the fiction of constructive service was invented; Martin *v.* Payne, 9 John. 387 (1812). Then the feelings of the parent, the dishonor to himself and his family, were accepted as the most important element of damage. Bedford *v.* McKowl, 3 Esp. 119 (1800); Andrews *v.* Askey, 8 C. & P. 7 (1837); Phillips *v.* Hoyle, 4 Gray, 568 (1855); Phelin *v.* Kenderdine, 20 Pa. St. 354 (1853). The allowance of these damages would seem to be a recognition that the invasion upon the honor of the family is an injury to the parent's person, for ordinarily mere injury to parental feelings is not an element of damage, *e. g.*, the suffering of the parent in case of physical injury to the child. Flemington *v.* Smithers, 2 C. & P. 292 (1827); Black *v.* Carrolton R. R. Co., 10 La. Ann. 33 (1855); Covington Street Ry. Co. *v.* Packer, 9 Bush, 455 (1872).

[6] "The notion of Mr. Justice Yates that nothing is property which cannot be earmarked and recovered in detinue or trover, may be true in an early stage of society, when property is in its simple form, and the remedies for violation of it also simple, but is not true in a more civilized state, when the relations of life and the interests arising therefrom are complicated." Erle, J., in Jefferys *v.* Boosey, 4 H. L. C. 815, 869 (1854).

as works of literature and art, [1] goodwill, [2] trade secrets, and trade-marks. [3]

This development of the law was inevitable. The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature.

Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone." [4] Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops." For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons; [5] and the evil of the invasion of privacy by the newspapers, long keenly felt, has been but recently discussed by an able writer. [6] The alleged facts of a somewhat notorious case brought before an inferior tribunal in New York a few months ago, [7] directly involved the consideration

[1] Copyright appears to have been first recognized as a species of private property in England in 1558. Drone on Copyright, 54, 61.

[2] Gibblett *v.* Read, 9 Mod. 459 (1743), is probably the first recognition of goodwill as property.

[3] Hogg *v.* Kirby, 8 Ves. 215 (1803). As late as 1742 Lord Hardwicke refused to treat a trade-mark as property for infringement upon which an injunction could be granted. Blanchard *v.* Hill, 2 Atk. 484.

[4] Cooley on Torts, 2d ed., p. 29.

[5] 8 Amer. Law Reg. N. S. 1 (1869); 12 Wash. Law Rep. 353 (1884); 24 Sol. J. & Rep. 4 (1879).

[6] Scribner's Magazine, July, 1890. "The Rights of the Citizen: To his Reputation," by E. L. Godkin, Esq., pp. 65, 67.

[7] Marion Manola *v.* Stevens & Myers, N. Y. Supreme Court, "New York Times" of June 15, 18, 21, 1890. There the complainant alleged that while she was playing in the Broadway Theatre, in a rôle which required her appearance in tights, she was, by means of a flash light, photographed surreptitiously and without her consent, from one of the boxes by defendant Stevens, the manager of the "Castle in the Air" company, and defendant Myers, a photographer, and prayed that the defendants might be restrained from making use of the photograph taken. A preliminary injunction issued *ex parte*, and a time was set for argument of the motion that the injunction should be made permanent, but no one then appeared in opposition.

of the right of circulating portraits ; and the question whether our law will recognize and protect the right to privacy in this and in other respects must soon come before our courts for consideration.

Of the desirability — indeed of the necessity — of some such protection, there can, it is believed, be no doubt. The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual ; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury. Nor is the harm wrought by such invasions confined to the suffering of those who may be made the subjects of journalistic or other enterprise. In this, as in other branches of commerce, the supply creates the demand. Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people. When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance. Easy of comprehension, appealing to that weak side of human nature which is never wholly cast down by the misfortunes and frailties of our neighbors, no one can be surprised that it usurps the place of interest in brains capable of other things. Triviality destroys at once robustness of thought and delicacy of feeling. No enthusiasm can flourish, no generous impulse can survive under its blighting influence.

It is our purpose to consider whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual; and, if it does, what the nature and extent of such protection is.

Owing to the nature of the instruments by which privacy is invaded, the injury inflicted bears a superficial resemblance to the wrongs dealt with by the law of slander and of libel, while a legal remedy for such injury seems to involve the treatment of mere wounded feelings, as a substantive cause of action. The principle on which the law of defamation rests, covers, however, a radically different class of effects from those for which attention is now asked. It deals only with damage to reputation, with the injury done to the individual in his external relations to the community, by lowering him in the estimation of his fellows. The matter published of him, however widely circulated, and however unsuited to publicity, must, in order to be actionable, have a direct tendency to injure him in his intercourse with others, and even if in writing or in print, must subject him to the hatred, ridicule, or contempt of his fellowmen, — the effect of the publication upon his estimate of himself and upon his own feelings not forming an essential element in the cause of action. In short, the wrongs and correlative rights recognized by the law of slander and libel are in their nature material rather than spiritual. That branch of the law simply extends the protection surrounding physical property to certain of the conditions necessary or helpful to worldly prosperity. On the other hand, our law recognizes no principle upon which compensation can be granted for mere injury to the feelings. However painful the mental effects upon another of an act, though purely wanton or even malicious, yet if the act itself is otherwise lawful, the suffering inflicted is *damnum absque injuria.* Injury of feelings may indeed be taken account of in ascertaining the amount of damages when attending what is recognized as a legal injury;[1]

[1] Though the legal value of "feelings" is now generally recognized, distinctions have been drawn between the several classes of cases in which compensation may or may not be recovered. Thus, the fright occasioned by an assault constitutes a cause of action, but fright occasioned by negligence does not. So fright coupled with bodily injury affords a foundation for enhanced damages; but, ordinarily, fright unattended by bodily injury cannot be relied upon as an element of damages, even where a valid cause of action exists, as in trespass *quare clausum fregit.* Wyman *v.* Leavitt, 71 Me. 227; Canning *v.* Williamstown, 1 Cush. 451. The allowance of damages for injury to the parents'

but our system, unlike the Roman law, does not afford a remedy even for mental suffering which results from mere contumely and insult, from an intentional and unwarranted violation of the "honor" of another.[1]

It is not however necessary, in order to sustain the view that the common law recognizes and upholds a principle applicable to cases of invasion of privacy, to invoke the analogy, which is but superficial, to injuries sustained, either by an attack upon reputation or by what the civilians called a violation of honor; for the legal doctrines relating to infractions of what is ordinarily termed the common-law right to intellectual and artistic property are, it is believed, but instances and applications of a general right to privacy, which properly understood afford a remedy for the evils under consideration.

The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others.[2] Under our system of government, he can never be compelled to express them (except when upon the witness-stand); and even if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them. The existence of this right does not depend upon the particular

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feelings, in case of seduction, abduction of a child (Stowe *v.* Heywood, 7 All. 118), or removal of the corpse of child from a burial-ground (Meagher *v.* Driscoll, 99 Mass. 281), are said to be exceptions to a general rule. On the other hand, injury to feelings is a recognized element of damages in actions of slander and libel, and of malicious prosecution. These distinctions between the cases, where injury to feelings does and where it does not constitute a cause of action or legal element of damages, are not logical, but doubtless serve well as practical rules. It will, it is believed, be found, upon examination of the authorities, that wherever substantial mental suffering would be the natural and probable result of the act, there compensation for injury to feelings has been allowed, and that where no mental suffering would ordinarily result, or if resulting, would naturally be but trifling, and, being unaccompanied by visible signs of injury, would afford a wide scope for imaginative ills, there damages have been disallowed. The decisions on this subject illustrate well the subjection in our law of logic to common-sense.

[1] "Injuria, in the narrower sense, is every intentional and illegal violation of honour, *i.e.*, the whole personality of another." "Now an outrage is committed not only when a man shall be struck with the fist, say, or with a club, or even flogged, but also if abusive language has been used to one." Salkowski, Roman Law, p. 668 and p. 669, n. 2.

[2] "It is certain every man has a right to keep his own sentiments, if he pleases. He has certainly a right to judge whether he will make them public, or commit them only to the sight of his friends." Yates, J., in Millar *v.* Taylor, 4 Burr. 2303, 2379 (1769).

method of expression adopted. It is immaterial whether it be by word[1] or by signs,[2] in painting,[3] by sculpture, or in music.[4] Neither does the existence of the right depend upon the nature or value of the thought or emotion, nor upon the excellence of the means of expression.[5] The same protection is accorded to a casual letter or an entry in a diary and to the most valuable poem or essay, to a botch or daub and to a masterpiece. In every such case the individual is entitled to decide whether that which is his shall be given to the public.[6] No other has the right to publish his productions in any form, without his consent. This right is wholly independent of the material on which, or the means by which, the thought, sentiment, or emotion is expressed. It may exist independently of any corporeal being, as in words spoken, a song sung, a drama acted. Or if expressed on any material, as a poem in writing, the author may have parted with the paper, without forfeiting any proprietary right in the composition itself. The right is lost only when the author himself communicates his production to the public,— in other words,

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[1] Nicols *v.* Pitman, 26 Ch. D. 374 (1884).

[2] Lee *v.* Simpson, 3 C. B. 871, 881; Daly *v.* Palmer, 6 Blatchf. 256.

[3] Turner *v.* Robinson, 10 Ir. Ch. 121; s. c. ib. 510.

[4] Drone on Copyright, 102.

[5] "Assuming the law to be so, what is its foundation in this respect? It is not, I conceive, referable to any consideration peculiarly literary. Those with whom our common law originated had not probably among their many merits that of being patrons of letters; but they knew the duty and necessity of protecting property, and with that general object laid down rules providently expansive,— rules capable of adapting themselves to the various forms and modes of property which peace and cultivation might discover and introduce.

"The produce of mental labor, thoughts and sentiments, recorded and preserved by writing, became, as knowledge went onward and spread, and the culture of man's understanding advanced, a kind of property impossible to disregard, and the interference of modern legislation upon the subject, by the stat. 8 Anne, professing by its title to be 'For the encouragement of learning,' and using the words 'taken the liberty,' in the preamble, whether it operated in augmentation or diminution of the private rights of authors, having left them to some extent untouched, it was found that the common law, in providing for the protection of property, provided for their security, at least before general publication by the writer's consent." Knight Bruce, V. C., in Prince Albert *v.* Strange, 2 DeGex & Sm. 652, 695 (1849).

[6] "The question, however, does not turn upon the form or amount of mischief or advantage, loss or gain. The author of manuscripts, whether he is famous or obscure, low or high, has a right to say of them, if innocent, that whether interesting or dull, light or heavy, saleable or unsaleable, they shall not, without his consent, be published." Knight Bruce, V. C., in Prince Albert *v.* Strange, 2 DeGex & Sm. 652, 694.

publishes it.[1] It is entirely independent of the copyright laws, and their extension into the domain of art. The aim of those statutes is to secure to the author, composer, or artist the entire profits arising from publication; but the common-law protection enables him to control absolutely the act of publication, and in the exercise of his own discretion, to decide whether there shall be any publication at all.[2] The statutory right is of no value, *unless* there is a publication; the common-law right is lost *as soon as* there is a publication.

What is the nature, the basis, of this right to prevent the publication of manuscripts or works of art? It is stated to be the enforcement of a right of property;[3] and no difficulty arises in accepting this view, so long as we have only to deal with the reproduction of literary and artistic compositions. They certainly possess many of the attributes of ordinary property: they are transferable; they have a value; and publication or reproduction is a use by which that value is realized. But where the value of the production is found not in the right to take the profits arising from publication, but in the peace of mind or the relief afforded by the ability to prevent any publication at all, it is difficult to regard the right as one of property, in the common acceptation

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[1] Duke of Queensberry *v.* Shebbeare, 2 Eden, 329 (1758); Bartlett *v.* Crittenden, 5 McLean, 32, 41 (1849).

[2] Drone on Copyright, pp. 102, 104; Parton *v.* Prang, 3 Clifford, 537, 548 (1872); Jefferys *v.* Boosey, 4 H. L. C. 815, 867, 962 (1854).

[3] "The question will be whether the bill has stated facts of which the court can take notice, as a case of civil property, which it is bound to protect. The injunction cannot be maintained on any principle of this sort, that if a letter has been written in the way of friendship, either the continuance or the discontinuance of the friendship affords a reason for the interference of the court." Lord Eldon in Gee *v.* Pritchard, 2 Swanst. 402, 413 (1818).

"Upon the principle, therefore, of protecting property, it is that the common law, in cases not aided or prejudiced by statute, shelters the privacy and seclusion of thought and sentiments committed to writing, and desired by the author to remain not generally known." Knight Bruce, V. C., in Prince Albert *v.* Strange, 2 DeGex & Sm. 652, 695.

"It being conceded that reasons of expediency and public policy can never be made the sole basis of civil jurisdiction, the question, whether upon any ground the plaintiff can be entitled to the relief which he claims, remains to be answered; and it appears to us that there is only one ground upon which his title to claim, and our jurisdiction to grant, the relief, can be placed. We must be satisfied, that the publication of private letters, without the consent of the writer, is an invasion of an exclusive right of property which remains in the writer, even when the letters have been sent to, and are still in the possession of his correspondent." Duer, J., in Woolsey, *v.* Judd, 4 Duer, 379, 384 (1855).

of that term. A man records in a letter to his son, or in his diary, that he did not dine with his wife on a certain day. No one into whose hands those papers fall could publish them to the world, even if possession of the documents had been obtained rightfully; and the prohibition would not be confined to the publication of a copy of the letter itself, or of the diary entry; the restraint extends also to a publication of the contents. What is the thing which is protected? Surely, not the intellectual act of recording the fact that the husband did not dine with his wife, but that fact itself. It is not the intellectual product, but the domestic occurrence. A man writes a dozen letters to different people. No person would be permitted to publish a list of the letters written. If the letters or the contents of the diary were protected as literary compositions, the scope of the protection afforded should be the same secured to a published writing under the copyright law. But the copyright law would not prevent an enumeration of the letters, or the publication of some of the facts contained therein. The copyright of a series of paintings or etchings would prevent a reproduction of the paintings as pictures; but it would not prevent a publication of a list or even a description of them.[1] Yet in the famous case of

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[1] "A work lawfully published, in the popular sense of the term, stands in this respect, I conceive, differently from a work which has never been in that situation. The former may be liable to be translated, abridged, analyzed, exhibited in morsels, complimented, and otherwise treated, in a manner that the latter is not.

"Suppose, however,— instead of a translation, an abridgment, or a review,— the case of a catalogue,— suppose a man to have composed a variety of literary works ('innocent,' to use Lord Eldon's expression), which he has never printed or published, or lost the right to prohibit from being published,— suppose a knowledge of them unduly obtained by some unscrupulous person, who prints with a view to circulation a descriptive catalogue, or even a mere list of the manuscripts, without authority or consent, does the law allow this? I hope and believe not. The same principles that prevent more candid piracy must, I conceive, govern such a case also.

"By publishing of a man that he has written to particular persons, or on particular subjects, he may be exposed, not merely to sarcasm, he may be ruined. There may be in his possession returned letters that he had written to former correspondents, with whom to have had relations, however harmlessly, may not in after life be a recommendation; or his writings may be otherwise of a kind squaring in no sort with his outward habits and worldly position. There are callings even now in which to be convicted of literature, is dangerous, though the danger is sometimes escaped.

"Again, the manuscripts may be those of a man on account of whose name alone a mere list would be matter of general curiosity. How many persons could be mentioned, a catalogue of whose unpublished writings would, during their lives or afterwards, command a ready sale!" Knight Bruce, V. C., in Prince Albert *v.* Strange, 2 De Gex & Sm. 652, 693.

Prince Albert *v.* Strange, the court held that the common-law rule prohibited not merely the reproduction of the etchings which the plaintiff and Queen Victoria had made for their own pleasure, but also "the publishing (at least by printing or writing), though not by copy or resemblance, a description of them, whether more or less limited or summary, whether in the form of a catalogue or otherwise."[1] Likewise, an unpublished collection of news possessing no element of a literary nature is protected from piracy.[2]

That this protection cannot rest upon the right to literary or artistic property in any exact sense, appears the more clearly

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[1] "A copy or impression of the etchings would only be a means of communicating knowledge and information of the original, and does not a list and description of the same? The means are different, but the object and effect are similar; for in both, the object and effect is to make known to the public more or less of the unpublished work and composition of the author, which he is entitled to keep wholly for his private use and pleasure, and to withhold altogether, or so far as he may please, from the knowledge of others. Cases upon abridgments, translations, extracts, and criticisms of published works have no reference whatever to the present question; they all depend upon the extent of right under the acts respecting copyright, and have no analogy to the exclusive rights in the author of unpublished compositions which depend entirely upon the common-law right of property." Lord Cottenham in Prince Albert *v.* Strange, 1 McN. & G. 23, 43 (1849). "Mr. Justice Yates, in Millar *v.* Taylor, said, that an author's case was exactly similar to that of an inventor of a new mechanical machine; that both original inventions stood upon the same footing in point of property, whether the case were mechanical or literary, whether an epic poem or an orrery; that the immorality of pirating another man's invention was as great as that of purloining his ideas. Property in mechanical works or works of art, executed by a man for his own amusement, instruction, or use, is allowed to subsist, certainly, and may, before publication by him, be invaded, not merely by copying, but by description or by catalogue, as it appears to me. A catalogue of such works may in itself be valuable. It may also as effectually show the bent and turn of the mind, the feelings and taste of the artist, especially if not professional, as a list of his papers. The portfolio or the studio may declare as much as the writing-table. A man may employ himself in private in a manner very harmless, but which, disclosed to society, may destroy the comfort of his life, or even his success in it. Every one, however, has a right, I apprehend, to say that the produce of his private hours is not more liable to publication without his consent, because the publication must be creditable or advantageous to him, than it would be in opposite circumstances."

"I think, therefore, not only that the defendant here is unlawfully invading the plaintiff's rights, but also that the invasion is of such a kind and affects such property as to entitle the plaintiff to the preventive remedy of an injunction; and if not the more, yet, certainly, not the less, because it is an intrusion,— an unbecoming and unseemly intrusion,— an intrusion not alone in breach of conventional rules, but offensive to that inbred sense of propriety natural to every man,— if intrusion, indeed, fitly describes a sordid spying into the privacy of domestic life,— into the home (a word hitherto sacred among us), the home of a family whose life and conduct form an acknowledged title, though not their only unquestionable title, to the most marked respect in this country." Knight Bruce, V. C., in Prince Albert *v.* Strange, 2 DeGex & Sm. 652, 696, 697.

[2] Kiernan *v.* Manhattan Quotation Co., 50 How. Pr. 194 (1876).

when the subject-matter for which protection is invoked is not even in the form of intellectual property, but has the attributes of ordinary tangible property. Suppose a man has a collection of gems or curiosities which he keeps private: it would hardly be contended that any person could publish a catalogue of them, and yet the articles enumerated are certainly not intellectual property in the legal sense, any more than a collection of stoves or of chairs.[1]

The belief that the idea of property in its narrow sense was the basis of the protection of unpublished manuscripts led an able court to refuse, in several cases, injunctions against the publication of private letters, on the ground that "letters not possessing the attributes of literary compositions are not property entitled to protection;" and that it was "evident the plaintiff could not have considered the letters as of any value whatever as literary productions, for a letter cannot be considered of value to the author which he never would consent to have published."[2] But

[1] "The defendants' counsel say, that a man acquiring a knowledge of another's property without his consent is not by any rule or principle which a court of justice can apply (however secretly he may have kept or endeavored to keep it) forbidden without his consent to communicate and publish that knowledge to the world, to inform the world what the property is, or to describe it publicly, whether orally, or in print or writing.

"I claim, however, leave to doubt whether, as to property of a private nature, which the owner, without infringing on the right of any other, may and does retain in a state of privacy, it is certain that a person who, without the owner's consent, express or implied, acquires a knowledge of it, can lawfully avail himself of the knowledge so acquired to publish without his consent a description of the property.

"It is probably true that such a publication may be in a manner or relate to property of a kind rendering a question concerning the lawfulness of the act too slight to deserve attention. I can conceive cases, however, in which an act of the sort may be so circumstanced or relate to property such, that the matter may weightily affect the owner's interest or feelings, or both. For instance, the nature and intention of an unfinished work of an artist, prematurely made known to the world, may be painful and deeply prejudicial against him; nor would it be difficult to suggest other examples. . . .

"It was suggested that, to publish a catalogue of a collector's gems, coins, antiquities, or other such curiosities, for instance, without his consent, would be to make use of his property without his consent; and it is true, certainly, that a proceeding of that kind may not only as much embitter one collector's life as it would flatter another, — may be not only an ideal calamity, — but may do the owner damage in the most vulgar sense. Such catalogues, even when not descriptive, are often sought after, and sometimes obtain very substantial prices. These, therefore, and the like instances, are not necessarily examples merely of pain inflicted in point of sentiment or imagination; they may be that, and something else beside." Knight Bruce, V. C., in Prince Albert *v.* Strange, 2 DeGex & Sm. 652, 689, 690.

[2] Hoyt *v.* Mackenzie, 3 Barb. Ch. 320, 324 (1848); Wetmore *v.* Scovell, 3 Edw. Ch. 515 (1842). See Sir Thomas Plumer in 2 Ves. & B. 19 (1813).

these decisions have not been followed,[1] and it may now be considered settled that the protection afforded by the common law to the author of any writing is entirely independent of its pecuniary value, its intrinsic merits, or of any intention to publish the same, and, of course, also, wholly independent of the material, if any, upon which, or the mode in which, the thought or sentiment was expressed.

Although the courts have asserted that they rested their decisions on the narrow grounds of protection to property, yet there are recognitions of a more liberal doctrine. Thus in the case of Prince Albert *v.* Strange, already referred to, the opinions both of the Vice-Chancellor and of the Lord Chancellor, on appeal, show a more or less clearly defined perception of a principle broader than those which were mainly discussed, and on which they both placed their chief reliance. Vice-Chancellor Knight Bruce referred to publishing of a man that he had "written to particular persons or on particular subjects" as an instance of possibly injurious disclosures as to private matters, that the courts would in a proper case prevent; yet it is difficult to perceive how, in such a case, any right of property, in the narrow sense, would be drawn in question, or why, if such a publication would be restrained when it threatened to expose the victim not merely to sarcasm, but to ruin, it should not equally be enjoined, if it threatened to embitter his life. To deprive a man of the potential profits to be realized by publishing a catalogue of his gems cannot *per se* be a wrong to him. The possibility of future profits is not a right of property which the law ordinarily recognizes; it must, therefore, be an infraction of other rights which constitutes the wrongful act, and that infraction is equally wrongful, whether its results are to forestall the profits that the individual himself might secure by giving the matter a publicity obnoxious to him, or to gain an advantage at the expense of his mental pain and suffering. If the fiction of property in a narrow sense must be preserved, it is still true that the end accomplished by the gossip-monger is attained by the use of that which

[1] Woolsey *v.* Judd, 4 Duer, 379, 404 (1855). "It has been decided, fortunately for the welfare of society, that the writer of letters, though written without any purpose of profit, or any idea of literary property, possesses such a right of property in them, that they cannot be published without his consent, unless the purposes of justice, civil or criminal, require the publication." Sir Samuel Romilly, *arg.*, in Gee *v.* Pritchard, 2 Swanst. 402, 418 (1818). But see High on Injunctions, 3d ed., § 1012, *contra*.

is another's, the facts relating to his private life, which he has seen fit to keep private. Lord Cottenham stated that a man "is entitled to be protected in the exclusive use and enjoyment of that which is exclusively his," and cited with approval the opinion of Lord Eldon, as reported in a manuscript note of the case of Wyatt *v.* Wilson, in 1820, respecting an engraving of George the Third during his illness, to the effect that "if one of the late king's physicians had kept a diary of what he heard and saw, the court would not, in the king's lifetime, have permitted him to print and publish it;" and Lord Cottenham declared, in respect to the acts of the defendants in the case before him, that "privacy is the right invaded." But if privacy is once recognized as a right entitled to legal protection, the interposition of the courts cannot depend on the particular nature of the injuries resulting.

These considerations lead to the conclusion that the protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone. It is like the right not to be assaulted or beaten, the right not to be imprisoned, the right not to be maliciously prosecuted, the right not to be defamed. In each of these rights, as indeed in all other rights recognized by the law, there inheres the quality of being owned or possessed — and (as that is the distinguishing attribute of property) there may be some propriety in speaking of those rights as property. But, obviously, they bear little resemblance to what is ordinarily comprehended under that term. The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality.[1]

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1 "But a doubt has been suggested, whether mere private letters, not intended as literary compositions, are entitled to the protection of an injunction in the same manner as compositions of a literary character. This doubt has probably arisen from the habit of not discriminating between the different rights of property which belong to an unpublished manuscript, and those which belong to a published book. The latter, as I have intimated in another connection, is a right to take the profits of publication. The former is a right to control the act of publication, and to decide whether there shall be any publication at all. It has been called a right of property; an expression perhaps not quite satisfactory, but on the other hand sufficiently descriptive of a right which, however incorporeal, involves many of the essential elements of property, and is at least positive and definite. This expression can leave us in no doubt as to the meaning of the learned

If we are correct in this conclusion, the existing law affords a principle which may be invoked to protect the privacy of the individual from invasion either by the too enterprising press, the photographer, or the possessor of any other modern device for recording or reproducing scenes or sounds. For the protection afforded is not confined by the authorities to those cases where any particular medium or form of expression has been adopted, nor to products of the intellect. The same protection is afforded to emotions and sensations expressed in a musical composition or other work of art as to a literary composition; and words spoken, a pantomime acted, a sonata performed, is no less entitled to protection than if each had been reduced to writing. The circumstance that a thought or emotion has been recorded in a permanent form renders its identification easier, and hence may be important from the point of view of evidence, but it has no significance as a matter of substantive right. If, then, the decisions indicate a general right to privacy for thoughts, emotions, and sensations, these should receive the same protection, whether expressed in writing, or in conduct, in conversation, in attitudes, or in facial expression.

It may be urged that a distinction should be taken between the

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judges who have used it, when they have applied it to cases of unpublished manuscripts. They obviously intended to use it in no other sense, than in contradistinction to the mere interests of feeling, and to describe a substantial right of legal interest." Curtis on Copyright, pp. 93, 94.

The resemblance of the right to prevent publication of an unpublished manuscript to the well-recognized rights of personal immunity is found in the treatment of it in connection with the rights of creditors. The right to prevent such publication and the right of action for its infringement, like the cause of action for an assault, battery, defamation, or malicious prosecution, are not assets available to creditors.

"There is no law which can compel an author to publish. No one can determine this essential matter of publication but the author. His manuscripts, however valuable, cannot, without his consent, be seized by his creditors as property." McLean, J., in Bartlett *v.* Crittenden, 5 McLean, 32, 37 (1849).

It has also been held that even where the sender's rights are not asserted, the receiver of a letter has not such property in it as passes to his executor or administrator as a salable asset. Eyre *v.* Higbee, 22 How. Pr. (N. Y.) 198 (1861).

"The very meaning of the word 'property' in its legal sense is 'that which is peculiar or proper to any person; that which belongs exclusively to one.' The first meaning of the word from which it is derived — *proprius* — is 'one's own.'" Drone on Copyright, p. 6.

It is clear that a thing must be capable of identification in order to be the subject of exclusive ownership. But when its identity can be determined so that individual owner ship may be asserted, it matters not whether it be corporeal or incorporeal.

deliberate expression of thoughts and emotions in literary or artistic compositions and the casual and often involuntary expression given to them in the ordinary conduct of life. In other words, it may be contended that the protection afforded is granted to the conscious products of labor, perhaps as an encouragement to effort.[1] This contention, however plausible, has, in fact, little to recommend it. If the amount of labor involved be adopted as the test, we might well find that the effort to conduct one's self properly in business and in domestic relations had been far greater than that involved in painting a picture or writing a book; one would find that it was far easier to express lofty sentiments in a diary than in the conduct of a noble life. If the test of deliberateness of the act be adopted, much casual correspondence which is now accorded full protection would be excluded from the beneficent operation of existing rules. After the decisions denying the distinction attempted to be made between those literary productions which it was intended to publish and those which it was not, all considerations of the amount of labor involved, the degree of deliberation, the value of the product, and the intention of publishing must be abandoned, and no basis is discerned upon which the right to restrain publication and reproduction of such so-called literary and artistic works can be rested, except the right to privacy, as a part of the more general right to the immunity of the person, — the right to one's personality.

It should be stated that, in some instances where protection has been afforded against wrongful publication, the jurisdiction has been asserted, not on the ground of property, or at least not wholly on that ground, but upon the ground of an alleged breach of an implied contract or of a trust or confidence.

Thus, in Abernethy *v.* Hutchinson, 3 L. J. Ch. 209 (1825), where the plaintiff, a distinguished surgeon, sought to restrain the publication in the "Lancet" of unpublished lectures which he had delivered at St. Batholomew's Hospital in London, Lord Eldon

[1] "Such then being, as I believe, the nature and the foundation of the common law as to manuscripts independently of Parliamentary additions and subtractions, its operation cannot of necessity be confined to literary subjects. That would be to limit the rule by the example. Wherever the produce of labor is liable to invasion in an analogous manner, there must, I suppose, be a title to analogous protection or redress." Knight Bruce, V, C., in Prince Albert *v.* Strange, 2 DeGex & Sm. 652, 696.

doubted whether there could be property in lectures which had not been reduced to writing, but granted the injunction on the ground of breach of confidence, holding "that when persons were admitted as pupils or otherwise, to hear these lectures, although they were orally delivered, and although the parties might go to the extent, if they were able to do so, of putting down the whole by means of short-hand, yet they could do that only for the purposes of their own information, and could not publish, for profit, that which they had not obtained the right of selling."

In Prince Albert *v.* Strange, 1 McN. & G. 25 (1849), Lord Cottenham, on appeal, while recognizing a right of property in the etchings which of itself would justify the issuance of the injunction, stated, after discussing the evidence, that he was bound to assume that the possession of the etchings by the defendant had "its foundation in a breach of trust, confidence, or contract," and that upon such ground also the plaintiff's title to the injunction was fully sustained.

In Tuck *v.* Priester, 19 Q. B. D. 639 (1887), the plaintiffs were owners of a picture, and employed the defendant to make a certain number of copies. He did so, and made also a number of other copies for himself, and offered them for sale in England at a lower price. Subsequently, the plaintiffs registered their copyright in the picture, and then brought suit for an injunction and damages. The Lords Justices differed as to the application of the copyright acts to the case, but held unanimously that independently of those acts, the plaintiffs were entitled to an injunction and damages for breach of contract.

In Pollard *v.* Photographic Co., 40 Ch. Div. 345 (1888), a photographer who had taken a lady's photograph under the ordinary circumstances was restrained from exhibiting it, and also from selling copies of it, on the ground that it was a breach of an implied term in the contract, and also that it was a breach of confidence. Mr. Justice North interjected in the argument of the plaintiff's counsel the inquiry: "Do you dispute that if the negative likeness were taken on the sly, the person who took it might exhibit copies?" and counsel for the plaintiff answered: "In that case there would be no trust or consideration to support a contract." Later, the defendant's counsel argued that "a person has no property in his own features; short of doing what is libellous or otherwise illegal, there is no restriction on the

photographer's using his negative." But the court, while expressly finding a breach of contract and of trust sufficient to justify its interposition, still seems to have felt the necessity of resting the decision also upon a right of property,[1] in order to

[1] "The question, therefore, is whether a photographer who has been employed by a customer to take his or her portrait is justified in striking off copies of such photograph for his own use, and selling and disposing of them, or publicly exhibiting them by way of advertisement or otherwise, without the authority of such customer, either express or implied. I say 'express or implied,' because a photographer is frequently allowed, on his own request, to take a photograph of a person under circumstances in which a subsequent sale by him must have been in the contemplation of both parties, though not actually mentioned. To the question thus put, my answer is in the negative, that the photographer is not justified in so doing. Where a person obtains information in the course of a confidential employment, the law does not permit him to make any improper use of the information so obtained; and an injunction is granted, if necessary, to restrain such use; as, for instance, to restrain a clerk from disclosing his master's accounts, or an attorney from making known his client's affairs, learned in the course of such employment. Again, the law is clear that a breach of contract, whether express or implied, can be restrained by injunction. In my opinion the case of the photographer comes within the principles upon which both these classes of cases depend. The object for which he is employed and paid is to supply his customer with the required number of printed photographs of a given subject. For this purpose the negative is taken by the photographer on glass; and from this negative copies can be printed in much larger numbers than are generally required by the customer. The customer who sits for the negative thus puts the power of reproducing the object in the hands of the photographer; and in my opinion the photographer who uses the negative to produce other copies for his own use, without authority, is abusing the power confidentially placed in his hands merely for the purpose of supplying the customer; and further, I hold that the bargain between the customer and the photographer includes, by implication, an agreement that the prints taken from the negative are to be appropriated to the use of the customer only." Referring to the opinions delivered in Tuck *v.* Priester, 19 Q. B. D. 639, the learned justice continued: "Then Lord Justice Lindley says: 'I will deal first with the injunction, which stands, or may stand, on a totally different footing from either the penalties or the damages. It appears to me that the relation between the plaintiffs and the defendant was such that, whether the plaintiffs had any copyright or not, the defendant has done that which renders him liable to an injunction. He was employed by the plaintiffs to make a certain number of copies of the picture, and that employment carried with it the necessary implication that the defendant was not to make more copies for himself, or to sell the additional copies in this country in competition with his employer. Such conduct on his part is a gross breach of contract and a gross breach of faith, and, in my judgment, clearly entitles the plaintiffs to an injunction, whether they have a copyright in the picture or not.' That case is the more noticeable, as the contract was in writing; and yet it was held to be an implied condition that the defendant should not make any copies for himself. The phrase 'a gross breach of faith' used by Lord Justice Lindley in that case applies with equal force to the present, when a lady's feelings are shocked by finding that the photographer she has employed to take her likeness for her own use is publicly exhibiting and selling copies thereof." North, J., in Pollard *v.* Photographic Co., 40 Ch. D. 345, 349–352 (1888).

"It may be said also that the cases to which I have referred are all cases in which there was some right of property infringed, based upon the recognition by the law of pro-

bring it within the line of those cases which were relied upon as precedents.[1]

This process of implying a term in a contract, or of implying a trust (particularly where the contract is written, and where there is no established usage or custom), is nothing more nor less than a judicial declaration that public morality, private justice, and general convenience demand the recognition of such a rule, and that the publication under similar circumstances would be considered an intolerable abuse. So long as these circumstances happen to present a contract upon which such a term can be engrafted by the judicial mind, or to supply relations upon which a trust or confidence can be erected, there may be no objection to working out the desired protection through the doctrines of contract or of trust. But the court can hardly stop there. The narrower doctrine may have satisfied the demands of society at a time when the abuse to be guarded against could rarely have arisen without violating a contract or a special

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tection being due for the products of a man's own skill or mental labor; whereas in the present case the person photographed has done nothing to merit such protection, which is meant to prevent legal wrongs, and not mere sentimental grievances. But a person whose photograph is taken by a photographer is not thus deserted by the law; for the Act of 25 and 26 Vict., c. 68, s. 1, provides that when the negative of any photograph is made or executed for or on behalf of another person for a good or valuable consideration, the person making or executing the same shall not retain the copyright thereof, unless it is expressly reserved to him by agreement in writing signed by the person for or on whose behalf the same is so made or executed; but the copyright shall belong to the person for or on whose behalf the same shall have been made or executed.

"The result is that in the present case the copyright in the photograph is in one of the plaintiffs. It is true, no doubt, that sect. 4 of the same act provides that no proprietor of copyright shall be entitled to the benefit of the act until registration, and no action shall be sustained in respect of anything done before registration; and it was, I presume, because the photograph of the female plaintiff has not been registered that this act was not referred to by counsel in the course of the argument. But, although the protection against the world in general conferred by the act cannot be enforced until after registration, this does not deprive the plaintiffs of their common-law right of action against the defendant for his breach of contract and breach of faith. This is quite clear from the cases of Morison *v.* Moat [9 Hare, 241] and Tuck *v.* Priester [19 Q. B. D. 629] already referred to, in which latter case the same act of Parliament was in question." Per North, J., ibid. p. 352.

This language suggests that the property right in photographs or portraits may be one created by statute, which would not exist in the absence of registration; but it is submitted that it must eventually be held here, as it has been in the similar cases, that the statute provision becomes applicable only when there is a publication, and that before the act of registering there is property in the thing upon which the statute is to operate.

[1] Duke of Queensberry *v.* Shebbeare, 2 Eden, 329; Murray *v.* Heath, 1 B. & Ad. 804; Tuck *v.* Priester, 19 Q. B. D. 629.

confidence; but now that modern devices afford abundant opportunities for the perpetration of such wrongs without any participation by the injured party, the protection granted by the law must be placed upon a broader foundation. While, for instance, the state of the photographic art was such that one's picture could seldom be taken without his consciously "sitting" for the purpose, the law of contract or of trust might afford the prudent man sufficient safeguards against the improper circulation of his portrait; but since the latest advances in photographic art have rendered it possible to take pictures surreptitiously, the doctrines of contract and of trust are inadequate to support the required protection, and the law of tort must be resorted to. The right of property in its widest sense, including all possession, including all rights and privileges, and hence embracing the right to an inviolate personality, affords alone that broad basis upon which the protection which the individual demands can be rested.

Thus, the courts, in searching for some principle upon which the publication of private letters could be enjoined, naturally came upon the ideas of a breach of confidence, and of an implied contract; but it required little consideration to discern that this doctrine could not afford all the protection required, since it would not support the court in granting a remedy against a stranger; and so the theory of property in the contents of letters was adopted.[1] Indeed, it is difficult to conceive on what theory of the law the casual recipient of a letter, who proceeds to publish it, is guilty of a breach of contract, express or implied, or of any breach of trust, in the ordinary acceptation of that term. Suppose a letter has been addressed to him without his solicitation. He opens it, and reads. Surely, he has not made any contract; he has not accepted any trust. He cannot, by opening and reading

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[1] See Mr. Justice Story in Folsom *v.* Marsh, 2 Story, 100, 111 (1841): —

"If he [the recipient of a letter] attempt to publish such letter or letters on other occasions, not justifiable, a court of equity will prevent the publication by an injunction, as a breach of private confidence or contract, or of the rights of the author; and *a fortiori*, if he attempt to publish them for profit; for then it is not a mere breach of confidence or contract, but it is a violation of the exclusive copyright of the writer. . . . The general property, and the general rights incident to property, belong to the writer, whether the letters are literary compositions, or familiar letters, or details of facts, or letters of business. The general property in the manuscripts remains in the writer and his representatives, as well as the general copyright. *A fortiori*, third persons, standing in no privity with either party, are not entitled to publish them, to subserve their own private purposes of interest, or curiosity, or passion."

the letter, have come under any obligation save what the law declares; and, however expressed, that obligation is simply to observe the legal right of the sender, whatever it may be, and whether it be called his right of property in the contents of the letter, or his right to privacy.[1]

A similar groping for the principle upon which a wrongful publication can be enjoined is found in the law of trade secrets. There, injunctions have generally been granted on the theory of a breach of contract, or of an abuse of confidence.[2] It would, of course, rarely happen that any one would be in the possession of a secret unless confidence had been reposed in him. But can it be supposed that the court would hesitate to grant relief against one who had obtained his knowledge by an ordinary trespass,— for instance, by wrongfully looking into a book in which the secret was recorded, or by eavesdropping? Indeed, in Yovatt *v.* Winyard, 1 J. & W. 394 (1820), where an injunction was granted against making any use of or communicating certain recipes for veterinary medicine, it appeared that the defendant, while in the plaintiff's employ, had surreptitiously got access to his book of recipes, and copied them. Lord Eldon "granted the injunction, upon the ground of there having been a breach of trust and confidence;" but it would seem to be difficult to draw any sound legal distinction between such a case and one where a mere stranger wrongfully obtained access to the book.[3]

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[1] "The receiver of a letter is not a bailee, nor does he stand in a character analogous to that of a bailee. There is no right to possession, present or future, in the writer. The only right to be enforced against the holder is a right to prevent publication, not to require the manuscript from the holder in order to a publication of himself." Per Hon. Joel Parker, quoted in Grigsby *v.* Breckenridge, 2 Bush. 480, 489 (1867).

[2] In Morison *v.* Moat, 9 Hare, 241, 255 (1851), a suit for an injunction to restrain the use of a secret medical compound, Sir George James Turner, V. C., said: "That the court has exercised jurisdiction in cases of this nature does not, I think, admit of any question. Different grounds have indeed been assigned for the exercise of that jurisdiction. In some cases it has been referred to property, in others to contract, and in others, again, it has been treated as founded upon trust or confidence,—meaning, as I conceive, that the court fastens the obligation on the conscience of the party, and enforces it against him in the same manner as it enforces against a party to whom a benefit is given, the obligation of performing a promise on the faith of which the benefit has been conferred; but upon whatever grounds the jurisdiction is founded, the authorities leave no doubt as to the exercise of it."

[3] A similar growth of the law showing the development of contractual rights into rights of property is found in the law of goodwill. There are indications, as early as the Year Books, of traders endeavoring to secure to themselves by contract the advantages now designated by the term "goodwill," but it was not until 1743 that goodwill received

We must therefore conclude that the rights, so protected, whatever their exact nature, are not rights arising from contract or from special trust, but are rights as against the world; and, as above stated, the principle which has been applied to protect these rights is in reality not the principle of private property, unless that word be used in an extended and unusual sense. The principle which protects personal writings and any other productions of the intellect or of the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relation, domestic or otherwise.[1]

If the invasion of privacy constitutes a legal *injuria*, the elements for demanding redress exist, since already the value of mental suffering, caused by an act wrongful in itself, is recognized as a basis for compensation.

The right of one who has remained a private individual, to prevent his public portraiture, presents the simplest case for such extension; the right to protect one's self from pen portraiture, from a discussion by the press of one's private affairs, would be a more important and far-reaching one. If casual and unimportant state-

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legal recognition as property apart from the personal covenants of the traders. See Allan on Goodwill, pp. 2, 3.

[1] The application of an existing principle to a new state of facts is not judicial legislation. To call it such is to assert that the existing body of law consists practically of the statutes and decided cases, and to deny that the principles (of which these cases are ordinarily said to be evidence) exist at all. It is not the application of an existing principle to new cases, but the introduction of a new principle, which is properly termed judicial legislation.

But even the fact that a certain decision would involve judicial legislation should not be taken as conclusive against the propriety of making it. This power has been constantly exercised by our judges, when applying to a new subject principles of private justice, moral fitness, and public convenience. Indeed, the elasticity of our law, its adaptability to new conditions, the capacity for growth, which has enabled it to meet the wants of an ever changing society and to apply immediate relief for every recognized wrong, have been its greatest boast.

"I cannot understand how any person who has considered the subject can suppose that society could possibly have gone on if judges had not legislated, or that there is any danger whatever in allowing them that power which they have in fact exercised, to make up for the negligence or the incapacity of the avowed legislator. That part of the law of every country which was made by judges has been far better made than that part which consists of statutes enacted by the legislature." 1 Austin's Jurisprudence, p. 224.

The cases referred to above show that the common law has for a century and a half protected privacy in certain cases, and to grant the further protection now suggested would be merely another application of an existing rule.

ments in a letter, if handiwork, however inartistic and valueless, if possessions of all sorts are protected not only against reproduction, but against description and enumeration, how much more should the acts and sayings of a man in his social and domestic relations be guarded from ruthless publicity. If you may not reproduce a woman's face photographically without her consent, how much less should be tolerated the reproduction of her face, her form, and her actions, by graphic descriptions colored to suit a gross and depraved imagination.

The right to privacy, limited as such right must necessarily be, has already found expression in the law of France.[1]

It remains to consider what are the limitations of this right to privacy, and what remedies may be granted for the enforcement of the right. To determine in advance of experience the exact line at which the dignity and convenience of the individual must yield to the demands of the public welfare or of private justice would be a difficult task; but the more general rules are furnished by the legal analogies already developed in the law of slander and libel, and in the law of literary and artistic property.

1. The right to privacy does not prohibit any publication of matter which is of public or general interest.

In determining the scope of this rule, aid would be afforded by the analogy, in the law of libel and slander, of cases which deal with the qualified privilege of comment and criticism on matters of public and general interest.[2] There are of course difficulties in applying such a rule; but they are inherent in the subject-matter, and are certainly no greater than those which exist in many other branches of the law,— for instance, in that large class of cases in which the reasonableness or unreasonableness of an act is made the test of liability. The design of the law must be to protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons, whatsoever; their position or station, from having matters which they may

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[1] Loi Relative à la Presse. 11 Mai 1868.

"11. Toute publication dans un écrit periodique relative à un fait de la vie privée constitue une contravention punie d'un amende de cinq cent francs.

"La poursuite ne pourra être exercée que sur la plainte de la partie interessée."

Riviére, Codes Francais et Lois Usuelles. App. Code Pen., p. 20.

[2] See Campbell *v.* Spottiswoode, 3 B. & S. 769, 776; Henwood *v.* Harrison, L. R. 7 C. P. 606; Gott *v.* Pulsifer, 122 Mass. 235.

properly prefer to keep private, made public against their will. It is the unwarranted invasion of individual privacy which is reprehended, and to be, so far as possible, prevented. The distinction, however, noted in the above statement is obvious and fundamental. There are persons who may reasonably claim as a right, protection from the notoriety entailed by being made the victims of journalistic enterprise. There are others who, in varying degrees, have renounced the right to live their lives screened from public observation. Matters which men of the first class may justly contend, concern themselves alone, may in those of the second be the subject of legitimate interest to their fellow-citizens. Peculiarities of manner and person, which in the ordinary individual should be free from comment, may acquire a public importance, if found in a candidate for political office. Some further discrimination is necessary, therefore, than to class facts or deeds as public or private according to a standard to be applied to the fact or deed *per se*. To publish of a modest and retiring individual that he suffers from an impediment in his speech or that he cannot spell correctly, is an unwarranted, if not an unexampled, infringement of his rights, while to state and comment on the same characteristics found in a would-be congressman could not be regarded as beyond the pale of propriety.

The general object in view is to protect the privacy of private life, and to whatever degree and in whatever connection a man's life has ceased to be private, before the publication under consideration has been made, to that extent the protection is to be withdrawn.[1] Since, then, the propriety of publishing the very same facts may depend wholly upon the person concerning whom they are published, no fixed formula can be used to prohibit obnoxious publications. Any rule of liability adopted must have in it an elasticity which shall take account of the varying circumstances of each case, — a necessity which unfortunately renders such a doctrine not only more difficult of application, but also to

[1] "Nos moeurs n'admettent pas la prétention d'enlever aux investigations de la publicité les actes qui relèvent de la vie publique, et ce dernier mot ne doit pas être restreint à la vie officielle ou à celle du fonctionnaire. Tout homme qui appelle sur lui l'attention ou les regards du publique, soit par une mission qu'il a reçue ou qu'il se donne, soit par le rôle qu'il s'attribue dans l'industrie, les arts, le theâtre, etc., ne peut plus invoquer contre la critique ou l'exposé de sa conduite d'autre protection que les lois qui repriment la diffamation et l'injure." Circ. Mins. Just., 4 Juin, 1868. Rivière Codes Français et Lois Usuelles, App. Code Pen. 20 n (b).

a certain extent uncertain in its operation and easily rendered abortive. Besides, it is only the more flagrant breaches of decency and propriety that could in practice be reached, and it is not perhaps desirable even to attempt to repress everything which the nicest taste and keenest sense of the respect due to private life would condemn.

In general, then, the matters of which the publication should be repressed may be described as those which concern the private life, habits, acts, and relations of an individual, and have no legitimate connection with his fitness for a public office which he seeks or for which he is suggested, or for any public or quasi public position which he seeks or for which he is suggested, and have no legitimate relation to or bearing upon any act done by him in a public or quasi public capacity. The foregoing is not designed as a wholly accurate or exhaustive definition, since that which must ultimately in a vast number of cases become a question of individual judgment and opinion is incapable of such definition; but it is an attempt to indicate broadly the class of matters referred to. Some things all men alike are entitled to keep from popular curiosity, whether in public life or not, while others are only private because the persons concerned have not assumed a position which makes their doings legitimate matters of public investigation.[1]

2. The right to privacy does not prohibit the communication of any matter, though in its nature private, when the publication is made under circumstances which would render it a privileged communication according to the law of slander and libel.

Under this rule, the right to privacy is not invaded by any publication made in a court of justice, in legislative bodies, or the committees of those bodies; in municipal assemblies, or the committees of such assemblies, or practically by any communication made in any other public body, municipal or parochial, or in any body quasi public, like the large voluntary associations formed

[1] "Celui-la seul a droit au silence absolu qui n'a pas expressément ou indirectment provoqué ou authorisé l'attention, l'approbation ou le blâme." Circ. Mins. Just., 4 Juin, 1868. Rivière Codes Français et Lois Usuelles, App. Code Pen. 20 n (b).

The principle thus expressed evidently is designed to exclude the wholesale investigations into the past of prominent public men with which the American public is too familiar, and also, unhappily, too well pleased; while not entitled to the "silence *absolu*" which less prominent men may claim as their due, they may still demand that all the details of private life in its most limited sense shall not be laid bare for inspection.

for almost every purpose of benevolence, business, or other general interest; and (at least in many jurisdictions) reports of any such proceedings would in some measure be accorded a like privilege.[1] Nor would the rule prohibit any publication made by one in the discharge of some public or private duty, whether legal or moral, or in conduct of one's own affairs, in matters where his own interest is concerned.[2]

3. The law would probably not grant any redress for the invasion of privacy by oral publication in the absence of special damage.

The same reasons exist for distinguishing between oral and written publications of private matters, as is afforded in the law of defamation by the restricted liability for slander as compared with the liability for libel.[3] The injury resulting from such oral communications would ordinarily be so trifling that the law might well, in the interest of free speech, disregard it altogether.[4]

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[1] Wason *v.* Walters, L. R. 4 Q. B. 73; Smith *v.* Higgins, 16 Gray, 251; Barrows *v.* Bell, 7 Gray, 331.

[2] This limitation upon the right to prevent the publication of private letters was recognized early: —

"But, consistently with this right [of the writer of letters], the persons to whom they are addressed may have, nay, must, by implication, possess, the right to publish any letter or letters addressed to them, upon such occasions, as require, or justify, the publication or public use of them; but this right is strictly limited to such occasions. Thus, a person may justifiably use and publish, in a suit at law or in equity, such letter or letters as are necessary and proper, to establish his right to maintain the suit, or defend the same. So, if he be aspersed or misrepresented by the writer, or accused of improper conduct, in a public manner, he may publish such parts of such letter or letters, but no more, as may be necessary to vindicate his character and reputation, or free him from unjust obloquy and reproach." Story, J., in Folsom *v.* Marsh, 2 Story, 100, 110, 111 (1841).

The existence of any right in the recipient of letters to publish the same has been strenuously denied by Mr. Drone; but the reasoning upon which his denial rests does not seem satisfactory. Drone on Copyright, pp. 136–139.

[3] Townshend on Slander and Libel, 4th ed., § 18; Odgers on Libel and Slander, 2d ed., p. 3.

[4] "But as long as gossip was oral, it spread, as regards any one individual, over a very small area, and was confined to the immediate circle of his acquaintances. It did not reach, or but rarely reached, those who knew nothing of him. It did not make his name, or his walk, or his conversation familiar to strangers. And what is more to the purpose, it spared him the pain and mortification of knowing that he was gossipped about. A man seldom heard of oral gossip about him which simply made him ridiculous, or trespassed on his lawful privacy, but made no positive attack upon his reputation. His peace and comfort were, therefore, but slightly affected by it." E. L. Godkin, "The Rights of the Citizen: To his Reputation." Scribner's Magazine, July, 1890, p. 66.

Vice-Chancellor Knight Bruce suggested in Prince Albert *v.* Strange, 2 DeGex & Sm. 652, 694, that a distinction would be made as to the right to privacy of works of art between an oral and a written description or catalogue.

4. The right to privacy ceases upon the publication of the facts by the individual, or with his consent.

This is but another application of the rule which has become familiar in the law of literary and artistic property. The cases there decided establish also what should be deemed a publication, — the important principle in this connection being that a private communication of circulation for a restricted purpose is not a publication within the meaning of the law.[1]

5. The truth of the matter published does not afford a defence. Obviously this branch of the law should have no concern with the truth or falsehood of the matters published. It is not for injury to the individual's character that redress or prevention is sought, but for injury to the right of privacy. For the former, the law of slander and libel provides perhaps a sufficient safeguard. The latter implies the right not merely to prevent inaccurate portrayal of private life, but to prevent its being depicted at all.[2]

6. The absence of "malice" in the publisher does not afford a defence.

Personal ill-will is not an ingredient of the offence, any more than in an ordinary case of trespass to person or to property. Such malice is never necessary to be shown in an action for libel or slander at common law, except in rebuttal of some defence, *e. g.*, that the occasion rendered the communication privileged, or, under the statutes in this State and elsewhere, that the statement complained of was true. The invasion of the privacy that is to be protected is equally complete and equally injurious, whether the motives by which the speaker or writer was actuated are, taken by themselves, culpable or not; just as the damage to character, and to some extent the tendency to provoke a breach of the peace, is equally the result of defamation without regard to the motives leading to its publication. Viewed as a wrong to the individual, this rule is the same pervading the whole law of torts, by which one is held responsible for his intentional acts, even though they are committed with no sinister intent; and viewed as a wrong

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[1] See Drone on Copyright, pp. 121, 289, 290.

[2] Compare the French law.

"En prohibant l'envahissement de la vie privée, sans qu'il soit nécessaire d'établir l'intention criminelle, la loi a entendue interdire toute discussion de la part de la défense sur la vérité des faits. Le remède eut été pire que le mal, si un débat avait pu s'engager sur ce terrain." Circ. Mins. Just., 4 Juin, 1868. Rivière Code Français et Lois Usuelles, App. Code Penn. 20 n(a).

to society, it is the same principle adopted in a large category of statutory offences.

The remedies for an invasion of the right of privacy are also suggested by those administered in the law of defamation, and in the law of literary and artistic property, namely: —

1. An action of tort for damages in all cases.[1] Even in the absence of special damages, substantial compensation could be allowed for injury to feelings as in the action of slander and libel.

2. An injunction, in perhaps a very limited class of cases.[2]

It would doubtless be desirable that the privacy of the individual should receive the added protection of the criminal law, but for this, legislation would be required.[3] Perhaps it would be deemed proper to bring the criminal liability for such publication within narrower limits; but that the community has an interest in preventing such invasions of privacy, sufficiently strong to justify the introduction of such a remedy, cannot be doubted. Still, the protection of society must come mainly through a recognition of

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[1] Comp. Drone on Copyright, p. 107.

[2] Comp. High on Injunctions, 3d ed., § 1015; Townshend on Libel and Slander, 4th ed., §§ 417a–417d.

[3] The following draft of a bill has been prepared by William H. Dunbar, Esq., of the Boston bar, as a suggestion for possible legislation: —

"SECTION 1. Whoever publishes in any newspaper, journal, magazine, or other periodical publication any statement concerning the private life or affairs of another, after being requested in writing by such other person not to publish such statement or any statement concerning him, shall be punished by imprisonment in the State prison not exceeding five years, or by imprisonment in the jail not exceeding two years, or by fine not exceeding one thousand dollars; provided, that no statement concerning the conduct of any person in, or the qualifications of any person for, a public office or position which such person holds, has held, or is seeking to obtain, or for which such person is at the time of such publication a candidate, or for which he or she is then suggested as a candidate, and no statement of or concerning the acts of any person in his or her business, profession, or calling, and no statement concerning any person in relation to a position, profession, business, or calling, bringing such person prominently before the public, or in relation to the qualifications for such a position, business, profession, or calling of any person prominent or seeking prominence before the public, and no statement relating to any act done by any person in a public place, nor any other statement of matter which is of public and general interest, shall be deemed a statement concerning the private life or affairs of such person within the meaning of this act.

"SECT. 2. It shall not be a defence to any criminal prosecution brought under section 1 of this act that the statement complained of is true, or that such statement was published without a malicious intention; but no person shall be liable to punishment for any statement published under such circumstances that if it were defamatory the publication thereof would be privileged."

the rights of the individual. Each man is responsible for his own acts and omissions only. If he condones what he reprobates, with a weapon at hand equal to his defence, he is responsible for the results. If he resists, public opinion will rally to his support. Has he then such a weapon? It is believed that the common law provides him with one, forged in the slow fire of the centuries, and to-day fitly tempered to his hand. The common law has always recognized a man's house as his castle, impregnable, often, even to its own officers engaged in the execution of its commands. Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?

*Samuel D. Warren,*
*Louis D. Brandeis.*

BOSTON, December, 1890.

# THE POLICE POWER AND INTER-STATE COMMERCE.

THE attention of the public has recently been attracted to the question of the relation of the police power to inter-state commerce by the so-called "original package" decision rendered by the Supreme Court of the United States in April last.[1] The majority of the Court there decided that a State law prohibiting the sale of intoxicating liquors, except for specified purposes, is void as to liquors imported from another State and sold by the importer in the original package. Two points of law are comprehended in this decision: —

1. An article imported from another State is within the domain of inter-state commerce until the original package is broken or sold by the importer.

2. Prohibitory liquor legislation is void so far as it applies to articles within the domain of inter-state commerce.

The first point involved, although never before adjudicated, falls within the principle of Brown *v.* Maryland,[2] where a similar decision was made as to the duration of foreign commerce. The application of that principle to inter-state commerce has been expected, and needs no comment here. The second point decided imposes an unexpected limitation upon the exercise of the State police power, and the matter deserves a careful examination.

The decision has not ceased to be of practical importance by reason of the recent legislation by Congress upon the subject,[3] for two reasons: first, it is held that the act is not retroactive, and gives no validity to legislation upon the statute books of the several

[1] Leisy *v.* Hardin, 135 U. S. 100. [2] 12 Wheat. 419.

[3] "All fermented, distilled, or other intoxicating liquors or liquids, transported into any State or Territory for use, consumption, sale, or storage, shall, on arrival in such State or Territory, be subject to the operation and effect of the laws of such State or Territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquors or liquids had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced in original packages or otherwise."

States at the time the act was passed;[1] secondly, the act applies to intoxicating liquors only, leaving the case unaffected as an authority so far as its principle applies to other articles of inter-state commerce. It may be added further that the constitutionality of the act is not unquestioned.[2]

The most important power possessed by a government is the power to protect its citizens from danger, disease, and vice. This power we call the police power, and not being delegated to Congress by the Constitution, is reserved to the States exclusively.[3] The police power has sometimes been defined in terms so broad as to include nearly all the legislative powers of a State; but the power to make regulations for the benefit of commerce, or to promote the public convenience, is distinct from the power to preserve and protect the public health, morals, and safety. Properly used, the term "police power" applies only to the latter portion of the sovereign powers of a State.[4] That the use of intoxicating liquors may cause pauperism, disease, and crime is common knowledge. Legislation designed to regulate and prohibit the sale of intoxicating liquors, so far as the internal commerce of a State is concerned, has frequently been upheld by the United States Supreme Court as a valid exercise of the police power.[5]

The question presented in Leisy *v.* Hardin, and in Bowman *v.* Chicago & N. W. Railway Co.,[6] on which the court in the former case greatly rely, is, whether a State can make police regulations concerning articles of inter-state commerce, when such regulations amount to a prohibition of traffic in such articles. It was decided in the negative, on the ground that it would conflict with the commercial powers of Congress.

Congress derives its powers over inter-state commerce from that clause in the Constitution which gives it "power . . . to regulate commerce with foreign nations and among the several States." If Congress has made any regulations of inter-state commerce, any conflicting State legislation is invalid, although made in pursuance of an acknowledged power of the State. The power of Congress within its domain must be supreme. In the absence

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[1] *In re* Rahrer, 43 Fed. Rep. 556.

[2] See 41 Alb. L. J. 473; 31 Cent. L. J. 50, 227.

[3] United States *v.* Dewitt, 9 Wall. 41. [4] See 3 Harv. Law Rev. 193 *et seq.*

[5] Bartemeyer *v.* Iowa, 18 Wall. 129; Beer Co. *v.* Massachusetts, 97 U. S. 25; Foster *v.* Kansas, 112 U. S. 201; Mugler *v.* Kansas, 123 U. S. 623; Kidd *v.* Pearson, 128 U. S. 1.

[6] 125 U. S. 465.

of congressional legislation, the State has power to act unless Congress has been given exclusive power over the subject.

The commercial powers of Congress are not in terms exclusive; but it is now settled that they are exclusive where the subject-matter is national in character, and admits of and requires a uniform rule. Accordingly, it is held, for example, that a State cannot regulate the rates of transportation on goods destined to another State,[1] impose a tax on goods which are being transported into or through the State,[2] or prescribe the accommodations to be furnished passengers coming into or going out of the State.[3] Two tests, then, are to be applied to determine the validity of State legislation: (1) Does Congress have exclusive power over the subject-matter? (2) Does the law conflict with any act of Congress?

In Leisy *v.* Hardin and Bowman *v.* Chicago & N. W. Railway Co. it was not claimed that there was any conflicting act of Congress. It was the first test named above which the majority of the court thought the legislation before them failed to meet. In Leisy *v.* Hardin the court do say, "Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of inter-state commerce are not such."[4] This statement, however, was not made to show a conflict between the State law and any congressional legislation. At the time of this decision the only legislation by Congress upon the subject of intoxicating liquors was to be found in the internal revenue laws. These laws were not passed to regulate commerce, but merely to tax certain articles when and where they were manufactured and dealt in, which is very far from a declaration that they should be dealt in and be subjects of commerce between the States. Attention was called to these acts of Congress in order to emphasize the undoubted fact that intoxicating liquors are articles of commerce. The decision proceeds upon the ground, and the whole opinion is devoted to showing, that the police power of the State does not extend to inter-state commerce, at least to the extent of prohibition.

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[1] Wabash, etc., Railway Co. *v.* Illinois, 118 U. S. 557.
[2] State Freight Tax, 15 Wall. 232.
[3] Hall *v.* De Cuir, 95 U. S. 485.
[4] 135 U. S. 100, 125.

The *ratio decidendi* of Leisy *v.* Hardin appears to be substantially this: The transportation of goods from one State to another is national in character, and requires a uniform rule. Congress, therefore, has exclusive power to regulate it. If Congress makes no regulations, it indicates its will that such commerce shall be free and unrestricted. The legislation in question is a regulation which does restrict it, and is, therefore, void.

If by "free and unrestricted" the court mean anything more than freedom from such commercial regulations as require a uniform rule affecting alike all the States, the inference is entirely unjustifiable, for it is only to this extent that Congress has exclusive jurisdiction over inter-state commerce. If Congress fails to act, all that is indicated is that it considers that there is no necessity for exercising its exclusive jurisdiction, — that is, making such regulations of commerce as should have a uniform rule in all the States. Certainly it cannot be inferred, from the mere inaction of Congress, that that body has thereby expressed its will that a State shall not exercise its police power upon inter-state commerce, where the exercise of it does not involve the exercise of powers given exclusively to Congress. The question to be determined, then, in each case, is, whether the regulation is of a nature where there should be uniformity in all the States.[1]

Police regulations do not require a uniform rule for all communities. The dangers to the health, safety, and morals of their citizens differ in nature and importance in the different States, and police regulations in each State should be adapted to the education and habits of its citizens. In one place one kind of regulation may be effective, in another place some other regulation is required, and in some communities prohibitory regulations are considered the only effective ones. Accordingly, the power to make police regulations was not delegated to Congress, but was reserved to the States respectively.[2] Furthermore, the power to regulate inter-state commerce was given to Congress for commercial reasons, and the States cannot be supposed to have intended to deprive themselves of so important a power as its police power, except so far as is necessary to enable Congress to properly exercise its power over inter-state commerce. As the mi-

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[1] See Bowman *v.* Chicago & N. W. Railway Co., 125 U. S. 465, 482-483, per Matthews, J.

[2] United States *v.* Dewitt, 9 Wall. 41.

nority of the court, in Leisy *v.* Hardin, well say, "An intention is not lightly to be imputed to the framers of the Constitution or to the Congress of the United States to subordinate the protection of the safety, health, and morals of the people to the promotion of trade."[1]

Whether Congress, while having no power to make police regulations, can, under its power to regulate inter-state commerce, make regulations designed to secure the safety and morals of the citizens of the United States, — regulations, for example, as to the manner in which arsenic and gunpowder are sold in the original package, or the hours or places in which the intoxicating liquors in the original package may be sold, is, to say the least, of doubtful constitutionality. It is certainly inexpedient from a practical point of view. It is much more important that this class of regulations should be in accordance with the regulations affecting the internal commerce of a State, concerning which Congress has no power, than that there should be a uniform rule in all the States. The practical difficulties which would otherwise arise are apparent to any one. If in any store there is one rule as to the sale of articles in the original package, and another as to articles manufactured within the State, or where the package is broken, confusion would be the inevitable result, and it would be next to impossible to enforce either law. Congress has not attempted to make any uniform regulations, and it is generally conceded that a State may to a certain extent regulate inter-state commerce to protect itself and its citizens from injury.

"Doubtless the States have power to provide by law suitable measures to prevent the introduction into the States of articles of trade which, on account of their existing condition, would bring in and spread disease, pestilence, and death, such as rags or other substances infected with the germs of yellow fever or the virus of small-pox, or cattle or meat or other provisions that are diseased or decayed, or otherwise from their condition or quality unfit for human use or consumption."[2] The somewhat fanciful reason is given that "such articles are not merchantable; they are not legitimate subjects of trade or commerce," and "may be rightly outlawed." This cannot be the true reason why regulations by the State concerning the importation of such articles are not inconsistent with the commercial powers of Congress, for, if it were, it would

[1] 135 U. S. 100, 158. [2] Bowman *v.* Chicago & N. W. Railway Co., 125 U. S. 465, 489.

follow that any regulations of commerce made by Congress would not apply to such articles. The true reason is, that the regulations are made in exercise of the police power, and do not conflict with any congressional legislation.

In Leisy *v.* Hardin the court say, as to articles of inter-state commerce, that "if directly dangerous in themselves the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them."[1] Whether the court intended to include in this class, articles other than those "unfit for human use," is not clear, but other judges have not confined the police power of the State to such articles. Poisons and explosives are articles the use of which needs to be carefully regulated. "Arsenic, dynamite powder, and nitro-glycerine are imported into every State under such restrictions as to their transportation and sale as to render it safe to deal in them."[2] The right of a State to regulate the transportation of nitro-glycerine has been expressly recognized by Congress.[3] So, also, it has been held that a State may require all locomotive engineers in the State, although engaged in inter-state commerce, to be examined, and may prevent them from operating a locomotive unless duly licensed by the examining board.[4] "It is conceded that the power of Congress to regulate inter-state commerce is plenary; that, as incident to it, Congress may legislate as to the qualifications, duties, and liabilities of employés and others on railway trains engaged in that commerce; and that such legislation will supersede any State action on the subject. But until such legislation is had, it is clearly within the competency of the States to provide against accidents on trains whilst within their limits. Indeed, it is a principle fully recognized by decisions of State and Federal courts that wherever there is any business in which, either from the products created or in the instrumentalities used, there is danger to life and property, it is not only within the power of the States, but it is among their plain duties, to make provision against accidents likely to follow in such business, so that the dangers attending it may be guarded against so far as is practicable."[5]

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[1] 135 U. S. 100, 125.

[2] Bowman *v.* Chicago & N. W. Railway Co., 125 U. S. 465, 504, per Field, J.

[3] Rev. Stats., § 4280.

[4] Smith *v.* Alabama, 124 U. S. 465; Nashville, etc. Railway Co. *v.* Alabama, 128 U. S. 96.

[5] Nashville, etc. Railway Co. *v.* Alabama, 128 U. S. 96, 99.

If, then, the police power extends to inter-state commerce, if the State, for the purpose of protecting the health and safety of its citizens, may regulate inter-state commerce to some extent, why may not its regulations extend to the prohibition of traffic in any articles, if such traffic is honestly believed to be dangerous to the community? The State prohibits merely because it deems that to be the most effective way of removing the evil in that community. A prohibition of traffic in any article is, indeed, in effect a declaration that such article shall not be an article of commerce. It is also true that the power of Congress to regulate commerce between the States must include the right to determine what shall be the subjects of such commerce. Otherwise, "the power to regulate commerce would become subordinate to the State police power."[1] Therefore, if Congress had prescribed that a certain article should be an article of inter-state commerce, or forbidden restrictions on its importation, a State could not prohibit its introduction within its limits and its sale in the original package. But until Congress has acted we have the same question as before: Is the regulation one that it is proper should be alike for all the States? And we are met with the same answer: Police regulations must be adapted to the communities where they have effect, and a country so large as this, and whose inhabitants differ so in characteristics in different sections, should not have one set of police regulations for the whole country. This is especially so, since any regulations made by Congress could have no application to the internal commerce of a State.

The conclusion reached by the court in the two cases under consideration does not appear to be tenable. The opinion in Bowman *v.* Chicago & N. W. Railway Co. appears to rest largely on a misconception of the police power. "Can it be supposed," says Mr. Justice Matthews, "that by omitting any express declarations on the subject, Congress has intended to submit to the several States the decision of the question in each locality of what shall and what shall not be articles of traffic in the inter-state commerce of the country? If so, it has left to each State, according to its caprice and arbitrary will, to discriminate for or against every article grown, produced, manufactured, or sold in any State and sought to be introduced as an article of commerce into any other. If the State of Iowa may prohibit the importation of in-

[1] License Cases, 5 How. 504, 600, per Catron, J.

toxicating liquors from all other States, it may also include tobacco or any other article, the use or abuse of which it may deem deleterious. It may not choose even to be governed by considerations growing out of the peace, comfort, or health of the community. Its policy may be directed to other ends. It may choose to establish a system directed to the promotion and benefit of its own agriculture, manufacture, or arts of any description, and prevent the introduction or sale within its limits of any or of all articles that it may select as coming into competition with those it seeks to protect. The police power of the State would extend to such cases as well as to those in which it sought to legislate in behalf of the health, peace, and morals of the people."[1] From which reasoning the conclusion is apparently drawn that the police power does not apply to inter-state commerce at all. With all due respect, however, to Mr. Justice Matthews, the police power would not extend to the cases named. The police power, properly so called, extends only to the protection of the health, morals, and safety of the people, and it seems perfectly reasonable to suppose that Congress by failing to act has intentionally left to each State to exclude any article which it may fairly deem inimical to the health, morals, and safety of its citizens. If a State does not act fairly, or, if ostensibly acting under its police power, its legislation discriminates against the citizens of other States, or affects objects and persons not within the scope of its purpose, there is ample authority to show that such acts are invalid, and not a legitimate exercise of the police power.[2]

In Leisy *v.* Hardin, the court, although relying greatly on Bowman *v.* Chicago & N. W. Railway, apparently do not misconceive in this way the extent of the police power of a State; but their opinion, at its very beginning, contains this proposition: "A subject-matter which has been confided exclusively to Congress by the Constitution [referring, as the context shows, to inter-state commerce], is not within the jurisdiction of the police power of the State unless placed there by congressional action."[3] No reasons are given other than those alluded to above, but the court cite, in support of this proposition, four cases, which it is desirable to examine.

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[1] 125 U. S. 465, 493.

[2] Henderson *v.* Mayor of New York, *infra;* Walling *v.* Michigan, *infra.*

[3] 135 U. S. 100, 108.

1. Henderson *v.* The Mayor of New York[1] was a case where the State law before the court imposed in effect a tax of a dollar and a half upon every immigrant landing at the port of New York. The State sought to defend this act as an exercise of its police power, claiming that its purpose was protection against pauper immigrants. The court held, however, that as the burden fell alike on all immigrants, without regard to their condition, it went beyond its professed purpose, and was not a valid exercise of the police power. What the powers of the State in the premises were, was expressly left open. "Whether in the absence of such action [by Congress] the States can, or how far they can, by appropriate legislation protect themselves against paupers, vagrants, criminals, and diseased persons, arriving in their territory from foreign sources, we do not decide."[2]

2. In Railroad Co. *v.* Husen,[3] the law in question prohibited the introduction into the State during eight months of each year of any Texan, Mexican, or Indian cattle. This was defended on the ground that it was designed to keep diseased cattle out of the State; but the court held that as the law applied to sound cattle as well as to diseased cattle, it went beyond the necessity of the case, and the act was therefore void. So far from denying that the police powers of the State may be applied to inter-state commerce, the court expressly admit that to be the law. "While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the State; while, for the purpose of self-protection, it may establish quarantine and reasonable inspection laws, it may not interfere with transportation into or through the State beyond what is absolutely necessary for its self-protection."[4] Referring to the case of Henderson *v.* Mayor of New York and Chy Lung *v.* Freeman,[5] decided at the same time, the court say, "Neither of these cases denied the right of a State to protect herself against paupers, convicted criminals, or lewd women, by necessary and proper laws, in the absence of legislation by Congress, but it is held that the right could only arise from vital necessity. . . . They deny validity to any State legislation professing to be an exercise of

[1] 92 U. S. 259. [2] Ibid. 275.
[3] 95 U. S. 465. [4] Ibid. 472. [5] 92 U. S. 275.

police power for protection against evils from abroad, which is beyond the necessity for its exercise wherever it interferes with the rights and powers of the Federal government."[1]

3. The third case is Walling *v.* Michigan,[2] which is also cited in Bowman *v.* Chicago & N. W. Railway Co., as a case by which "the present case is concluded." This case turned upon the validity of a statute of the State of Michigan, which imposed a tax upon all persons engaged in the sale of intoxicating liquors, imposing a heavier burden upon the agents of non-resident dealers than it did upon those of resident dealers. The court held, that inasmuch as the tax operated to the disadvantage of the products of other States, it was in effect a regulation of commerce between the States, and the statute was therefore void. Replying to the suggestion that the tax was "an exercise of the police power of the State for the discouragement of the use of intoxicating liquors and the preservation of the health and morals of the people," the court say, "This would be a perfect justification of the act if it did not discriminate against the citizens and products of other States in a matter of commerce between the States, and thus usurp one of the prerogatives of the national Legislature."[3] The case is decided solely upon the ground of discrimination, and the judgment was in no way conclusive upon the court in a case like Bowman *v.* Chicago & N. W. Railway Co., where there was no discrimination. The court, in the latter case, note the difference in the two cases, and say,[4] "It would be error to lay any stress on the fact that the statute passed upon in that case [ Walling *v.* Michigan ] made a discrimination between the citizens and products of other States in favor of those of the State of Michigan. . . . This appears plainly from what was decided in the case of Robbins *v.* Shelby Taxing District," which is the fourth case relied upon in Leisy *v.* Hardin.

4. In Robbins *v.* Shelby Taxing District[5] the question of police power was not involved at all. The statute there declared to be void was one requiring all drummers, not having a licensed place of business within the Shelby Taxing District, and offering for sale or selling goods by sample, to be licensed and pay a fee therefor. The question discussed was whether the license tax was upon the occupation or upon commerce; and the court held that in effect it was a tax upon commerce, and a regulation of commerce, and

[1] 95 U. S. 465, 473. [2] 116 U. S. 446. [3] Ibid. 460.
[4] 125 U. S. 465, 496. [5] 120 U. S. 489.

therefore void; and that it was none the less a regulation of inter-state commerce because it regulated the internal commerce of the State in the same way. There was no pretence that the business of the plaintiff in error — selling stationery, etc., by sample — was inimical to the health or safety of the State, or that the law was passed in the exercise of the police power. This case covers an entirely different ground from Walling *v.* Michigan, and does not in any way impeach or modify that case.

None of these cases, therefore, sustain the proposition that inter-state commerce is not within the jurisdiction of the police power of a State. Indeed, there is no authority for such a doctrine, unless it be found in Leisy *v.* Hardin.

Notwithstanding the language used by the court in Leisy *v.* Hardin, it is not at all certain that they intended to decide the case on the ground that the police power of a State does not include inter-state commerce within its jurisdiction. The law in question prohibited traffic, which is somewhat different from regulating it; and it may be that the court thought that such a law was more a commercial regulation than a police regulation. The following language seems to bear this interpretation: "Whenever the law of the State amounts essentially to a regulation of commerce with foreign nations or among the States, as it does when it inhibits, directly or indirectly, the receipt of an imported commodity, or its disposition before it has ceased to become an article of trade between one State and another, or another country and this, it comes in conflict with a power which in this particular has been exclusively vested in the general government, and is, therefore, void."[1] "To concede to a State the power to exclude, directly or indirectly, articles [of inter-state commerce] without congressional permission, is to concede to a majority of the people of a State represented in the State Legislature the power to regulate commercial intercourse between the States, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States represented in Congress."[2] In Bowman *v.* Chicago & N. W. Railway Co., Mr. Justice Field puts his concurring opinion expressly upon this ground. After noticing that the police power can be applied to inter-state commerce, referring to Mugler *v.* Kansas,[3] where a State law prohibiting the manufacture of intoxicating liquors within the limits of the State

[1] 135 U. S. 100, 123. [2] Ibid. 125. [3] 123 U. S. 623.

was held to be a valid exercise of the police power, he says: "The decision in the Kansas case may perhaps be reconciled with the one in this case by distinguishing the power of the State over property created within it and its power over property imported — its power in one case extending for the protection of the health, morals,and safety of its people to the absolute prohibition of the sale or use of the article, and in the other extending only to such regulations as may be necessary for the safety of the community until it has been incorporated into and become a part of the general property of the State. However much this distinction may be open to criticism, it furnishes, as it seems to me, the only way in which the two decisions can be reconciled."[1]

The distinction is, indeed, open to criticism, for the difference between prohibition and regulation is one of degree, not of kind. Whether the law amounts to a prohibition or not, it affects commerce in some degree, but being designed to secure the public health and safety, it is in either case a police regulation; and, therefore, as has been previously shown, even in the case of inter-state commerce it is a proper case for a State to act, so far as its legislation does not conflict with any act of Congress.

The decision in Leisy *v.* Hardin and Bowman *v.* Chicago & N. W. Railway Co. must be considered erroneous; but if they are to stand, they will undoubtedly be sustained on the ground stated by Mr. Justice Field, rather than on the ground that the police power does not apply to inter-state commerce. It is hardly possible to believe that the court would have decided that a mere regulation by a State of the sale of intoxicating liquors — for example, forbidding sales to minors, or to adults between eleven o'clock in the evening and six o'clock in the morning — would not be valid as applied to sales of liquor in the original package. But it is to be hoped that these decisions are not final, and that the opinion of the minority of the court will ultimately be adopted.

Undoubtedly it is oftentimes difficult to draw the line between State and National powers; but the line should be drawn so far as possible, so as to give full play to the powers of each. In these decisions the line is not so drawn. Concerning a portion of the property and transactions within its borders, a State may not legislate as it desires, in order to protect the health and morals of its citizens; and the exercise of its police power over other property

[1] 125 U. S. 465, 506.

and transactions is rendered ineffective. The police regulation that the State makes, may not conflict with any national regulation, and cannot interfere with the making of any; it may be a perfectly reasonable provision to prevent disease and crime; but as to inter-state commerce it may, under these decisions, be invalid. That such a consequence should follow from merely giving Congress "power . . . to regulate commerce with foreign nations and among the several States," a provision made solely for the benefit of trade, is a result which it is hardly presumptuous to say the framers of the Constitution could never have intended.

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# HARVARD LAW REVIEW.

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IN a recent case in a county court in Iowa, the question was raised between landlord and tenant as to the acquisition of rights of property in a meteorite. The tenant for years saw the meteorite fall, and immediately dug it up and sold it. It had already been decided by one of the lower courts of Iowa, in 1875, that a meteorite which fell on a highway belonged to the owner of the fee and not to the finder;[1] and in the case above mentioned the landlord prevailed. The tenant's vendee, however, was not satisfied with the decision, and we may hope soon to obtain the opinion of a court of last resort.

There was a case in England,[2] in 1839, where large stones had fallen upon copyhold land from an adjoining cliff. The copyholder removed and sold some of these stones, and the lord brought trover and obtained judgment on the ground that the stones had fallen before the copyholder came into possession, and were part of the soil granted to him. Parke, B., however, prefaced his opinion by saying: "If it had been shown that these stones had come from the adjoining hills by some convulsion of nature, or by the act of God, while the defendant was the copyholder, his argument would be well founded; then they would belong either to the party from whose lands they had been severed, or to the copyholder, as having fallen by accident upon his soil; and the lord would have no more right to them than in the case of an ordinary occupier of land under a landlord. But that question does not arise here. These stones have been in the same state as far back as living memory goes, and are to be considered a portion of the soil," etc.

It seems impossible to support this distinction. For if, as is assumed by Parke, B., in the case actually before him, the stones were a part of the soil when the tenant came into possession, must they not have been a part of the soil from the moment they fell and became embedded in it? From that moment they were physically annexed to the soil, and what more is necessary to make them a part of it? There cannot, as in the case of a fixture erected by the tenant, be any

[1] 15 Alb. L. J. 216.

[2] *Dearden* v. *Evans*, 5 M. & W. 11.

question as to the intention with which the annexation was made; for it was not made by human agency. If then by falling upon and becoming embedded in the land when there was no tenant there, they became a part of the soil, it is clear that the mere existence of a lease at the time of the fall can make no difference. For the physical annexation is the same whether there is a lease or not.

The question then is, has the tenant any right to sever; and it is submitted that he has not. Even when a fixture is erected by the tenant himself the general rule is that it becomes the absolute property of the landlord. To this rule there are, no doubt, many exceptions by which the tenant is given a right to sever; but in a case where he had no previous ownership in the thing annexed, it seems impossible to devise any reason whatever for departing from the general rule. A closer analogy, however, is found in the case of accretion,—an addition of land to land. For, though a meteorite is a mineral differing in crystalline structure from any mineral native to this earth, it is, in outward characteristics, like any other stone, and stones are in large measure the stuff that land is made of. A meteorite is, of course, a sudden addition to land, and true it is that sudden accretion to A.'s land from the sea, or by the sudden movement of a river, does not become the property of A., — but no more does it become the property of A.'s tenant. The only reason, moreover, that it does not become A.'s property is that it had a former owner (either the king or a private individual), and can be identified. As to the question between landlord and tenant, therefore, the case of the meteorite and the case of gradual accretion (the kind of accretion which is deemed to have had no former owner, or rather to be lost to its former owner) seem to be exactly the same. And we do not know that it has ever been contended that a tenant for years may cut off the land which, in the course of the tenancy, has been added by gradual accretion from the sea or by the slow movement of a river from its bed, and return to the landlord the exact number of square feet which he received from him.

To return to Baron Parke's decision and dictum, we have found that, on the supposition that the stones became a part of the land, it is impossible to support the dictum; and on the facts of the case it is impossible to support any other supposition. For the only other supposition is that stones embedded in land are chattels unconnected with the land, the objection to which is that it is not true. It would be extraordinary, for instance, to hold that the executor, and not the heir, of the owner of the fee would take such stones.

We feel that we have been rash in venturing to question even a dictum of Baron Parke's, and are glad to be able to refer to a case in the Kings' Bench,[1] in 1835, containing at least dicta in support of the view we have expressed. The case was trespass for carrying away sand which had been blown from the sea-shore and formed mounds upon the land. The defendants justified by a custom, and since there cannot be a custom to take a profit *in alieno solo*, the question was whether it was a taking of a part of the ground, and the court held that it was. It may be possible to support the case merely upon the ground that the sand which had drifted in could not be distinguished from that originally there. Littledale, J., said, however: "Of what is soil in general composed?

[1] *Blewett* v. *Tregonning*, 3 A. & E. 554, 574-5.

Many things enter into it which are brought artificially or by accident, and the moment they are so brought they become part of the soil." And Patterson, J.: "I am, however, of opinion that when anything in the nature of soil is blown or lodged upon a man's close, it is part of the close, and he has a right to it against all the world."[1]

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THE case of *Leisy* v. *Hardin* last spring was regarded by some persons as indicating an alliance between the Supreme Court of the United States and the liquor interest, — a view which involved a failure to observe that the doctrine, beside having no peculiar application to the liquor traffic, was as old as Chief Justice Marshall's opinion in *Brown* v. *Maryland*, 12 Wheat. 419 (1827). A similar inattention to the real scope and meaning of a decision has caused the recent case of *Crowley* v. *Christensen*, 11 Sup. Ct. Rep. 13, to be proclaimed by the press as a vindication of prohibition, and hence, it would seem, as evidence of a change of heart on the part of the Supreme Court. How far such a view is from a true understanding of the case may be easily seen. In *Yick Wo* v. *Hopkins*, 118 U. S. 356, a San Francisco ordinance forbade any one to carry on a laundry without the consent of a board of supervisors. No express limitation was put on their power in the matter; and the court found in all the circumstances of the case, including the way in which the law was administered, an intention to give the board an arbitrary right to withhold its consent at will and by this means to discriminate against the Chinese. For these reasons the ordinance was held to deprive the petitioner of the equal protection of the laws within the meaning of the Fourteenth Amendment.[2] In *Crowley* v. *Christensen* an ordinance required every liquor dealer to take out a license, and for that purpose to obtain the consent of the police commissioners. Sawyer, J., held in the Circuit Court[3] that the facts were not distinguishable in principle from *Yick Wo* v. *Hopkins*, and that the ordinance was therefore unconstitutional. As the case, however, was apparently free from any of the special circumstances which, together with the mode of administering the ordinance, indicated a grant of arbitrary power in *Yick Wo* v. *Hopkins*, the decision of Sawyer, J., obviously goes further than that case, and seems to lay down the proposition that the absence of express limitation is necessarily equivalent to a grant of unrestricted power. This is, however, a proposition for which *Yick Wo* v. *Hopkins* does not stand; and all that was necessary for the Supreme Court to decide in reversing the decision below was that the ordinance granted no such power in giving licenses, but only the right to give them on general grounds of fitness and convenience. Such a ground of decision would cover any other business as well as the liquor traffic, and would certainly not have any great significance in the prohibition controversy. And the opinion of Mr. Justice Field in *Crowley* v. *Christensen* does not appear to decide more than this. It contains, to be sure, extended observations on the mischief arising from the sale of liquor, but it nowhere countenances the view that a grant of arbitrary power to give

[1] There is a French case referred to in 20 Alb. L. J. 299, in which it was decided that a meteorite "cannot be an accession to the land upon which it alights. It belongs entirely by occupation to him who has found it." And Marcadé, after citing this case, added, "One can hardly conceive how an advocate could be found to entertain a contrary opinion."

[2] The court went on the further ground that even if the ordinance was constitutional on its face, its actual operation under State authority amounted to a practical denial by the State itself of the equal protection of the laws, and so entitled the petitioner to relief.

[3] *In re Christensen*, 43 Fed. Rep. 243.

licenses would be constitutional; and it expressly recognizes the right of the legislature to regulate any lawful trade. On principle it would seem that the case would have been governed by the same considerations if the ordinance had dealt with the licensing of restaurant keepers or apothecaries.

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To refrain from drinking liquor, smoking, and playing cards or billiards is very likely not a detriment from a moral standpoint; and the Supreme Court of New York points out in *Hamer* v. *Sidway* (11 N. Y. Supp. 182) that it cannot be disadvantageous in a pecuniary sense to abstain from habits which are "not only expensive, but unnecessary and evil in their tendency." But to say that no legal detriment is involved in such a course, *i.e.*, that no legal right is parted with, would probably surprise a good many persons who are in a situation similar to the plaintiff's in that case. The defendant's testator said to his nephew, fifteen years old, that if he would refrain from the habits above-mentioned till he was twenty-one, he would give him $5,000; the nephew did so, and suit is brought on the promise. Whether the parties to the transaction regarded it as an offer for a unilateral contract, or merely as a promised gift (the latter was the view of the court), is a question of fact on which the result reached may have been correct enough, though the argument drawn from the use of the word "give" in the uncle's promise — that it presumably meant a gratuitous transfer, unless evidence could be brought forward to show the contrary — seems to overlook a common use of language. The conduct of the nephew, moreover, indicates that he thought he had something more than a mere moral claim. But the court's further suggestion, that even if there were an intention to contract the acts of the nephew, though performed at the uncle's request and in exchange for his promise, would not be a sufficient consideration, is surprising. The proposition that the promisee must incur a detriment *in a pecuniary sense* can hardly be sound, in any such application of it, at least, as the court would here make. These points were not, however, conclusive of the decision in *Hamer* v. *Sidway*, as there were further difficulties in the way of plaintiff's recovery.

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A CASE presenting a very curious situation of affairs has recently been decided in the courts of Massachusetts, and is now on its way to final settlement in the Supreme Court of the United States. The facts are briefly as follows: The county of Nantucket comprises and is coterminous with the town of the same name. In 1888 the selectmen of the town discovered that the town treasurer, one Brown, had been fraudulently obtaining money from the town for a number of years by means of forged vouchers. A town-meeting was immediately called, which was very largely attended by the voters of the town, and at which it was unanimously decided to take steps towards having Brown prosecuted. Accordingly, at the next session of the Superior Court for the county of Nantucket, a grand jury, drafted by the selectmen at a town-meeting called for that purpose, brought in an indictment against Brown for forgery. The trial jury was also drafted by the selectmen in like manner. Before pleading to the indictment, the defendant asked the judge to rule that the grand jury, by reason of bias and interest, was not competent to make the presentment for the crime. And

the trial jury was objected to for the same reason. The Court refused so to rule, and the defendant excepted. The Supreme Court (*Com.* v. *Brown*, 147 Mass. 585) upheld the ruling of the trial judge, on the ground that the interest of the jurors in both cases was not sufficient to incapacitate them, and that the interest of the selectmen was not sufficient to render the draft illegal. In the course of the opinion the court remarked that the defendant could not have been indicted in any other county than Nantucket.

The exceptions being overruled, the defendant pleaded to the indictment, and a verdict was found against him. After the trial had begun the defendant's counsel learned for the first time that some, if not all of the members of both juries had been present at the meeting at which it was voted to prosecute Brown, and had voted for the prosecution. He immediately filed a plea of exception to the jurisdiction, on the ground that the members of both juries were incompetent, because of their participation in the town-meeting; that under the circumstances of the case it would be impossible to get an impartial jury in the county of Nantucket; and that the present trial, and any trial by the court in that county, would be in violation of the Constitution of Massachusetts, and of the Fourteenth Amendment of the Constitution of the United States. The court overruled the plea and the defendant excepted. The Supreme Court (*Com.* v. *Brown*, 150 Mass. 334) overruled the exception. The court held that the plea amounted to a motion in arrest of judgment, and that the objection to the jurisdiction on the above grounds, not appearing on the record, could not be brought before them.

The conviction was therefore affirmed, the defendant was sentenced and imprisoned. Two weeks later his counsel obtained a writ of review from a court of the United States, and the defendant was released on bail. The case is now docketed in the United States Supreme Court, where, unless advanced, it will not come up for three years. It is not altogether unlikely that that court may decide in favor of the defendant Brown, and in that event, as it is admitted that he cannot be tried in any other county, the Legislature of Massachusetts will have the question forcibly presented whether some change in the judicial system of the county of Nantucket is not desirable.

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In a case at the Drogheda Sessions, mentioned by the March "Jurist," the defendant, being sued for rent, "pleaded the house was haunted, and his wife had been greatly frightened by a ghost appearing at their bed and throwing something upon her at night; they had to leave the house, and witness would prove it was haunted." The court ruled, correctly as it would seem, that these facts did not constitute a defence; but if the lease were of a furnished house the question might perhaps be more doubtful. According to the doctrine of *Smith* v. *Marrable* (11 M. & W. 5) there is an implied covenant in such a case that the house is reasonably fit for habitation, and the fact that the house is infested with bed-bugs is a breach of this covenant. If the presence of the ghost should be thought equally objectionable, he might thus become a material issue; but it may be doubted whether the court would think there was substance enough in a ghost for judicial investigation.

# THE LAW SCHOOL.

## LECTURE NOTES.

[These notes were taken by students from lectures delivered as part of the regular course of instruction in the School. They represent, therefore, no carefully formulated statements of doctrine, but only such informal expressions of opinion as are usually put forward in the class-room. For the form of these notes the lecturers are not responsible.]

WILLS — INCORPORATION BY REFERENCE. — (*From Prof. Gray's Lectures.*) — To incorporate in a will a document which is not duly attested, the latter must be so described in the will as to be capable of identification. This identification, as is pointed out in *Allen* v. *Maddock*,[1] will always be to some extent a question of parol evidence; but the document must be referred to as one then existing; if there is not such a reference, it is immaterial that there is already in existence a paper which satisfies the description. This latter point is illustrated by *Goods of Sunderland*,[2] where the words of the will, according to the construction put upon them by the court, were never meant to describe the particular paper previously executed, but were ambulatory, and intended to cover any paper which the testator might make in the future. *Goods of Truro*[3] raised the further question, how far the republication of the will by a later valid codicil might have the effect of adding to the will something which was not a part of it when executed, and which was not mentioned in the codicil; *e.g.*, a memorandum referred to in the will, but not prepared till after its execution. Sir J. P. Wilde (Lord Penzance) held that a codicil might have this effect. The will, he said, was to be read as if the testator had sat down and reëxecuted it at the time of making the codicil; and if there were in it any words which, speaking from the date of the codicil, would contain a sufficient reference to a document as then existing to incorporate it within the principle of *Allen* v. *Maddock*, that document might be treated as part of the will.

The test thus laid down seems open to some criticism. These cases of incorporation by reference present two difficulties which should not be confounded. (1.) The words of the will may be ambulatory, as in *Goods of Sunderland*, above. This difficulty is apparently a fatal obstacle in the way of incorporating any paper, though it falls within the description; for it is impossible to show any reference in the will to that particular document. (2.) The paper, though specifically described, — *e.g.*, "the letter which I mean to write to-morrow," — may not be in existence when the will is made, and therefore be invalid as a testamentary instrument, for lack of due execution. This objection seems to be removed, however, by a good codicil made after the preparation of the memorandum; for the codicil is properly executed, and the will, republished by the codicil, contains a sufficient reference to this memorandum, which may therefore be treated as a valid testamentary disposition. The test of *Goods of Truro* would seem, however, if strictly applied, to lead to a contrary result in the case just put; for the words of the will, treated as if re-executed at the date of the codicil, will still be found to refer to the

1 11 Moo. P. C. 427; 4 Gray's Cas. Prop. 198.
2 L. R. 1 P. & D 198; 4 Gray's Cas. Prop. 217.
3 L. R. 1 P. & D. 201; 4 Gray's Cas. Prop. 219.

future, and not to any document as existing. And for this reason, that the language of the will was of a future character, Sir J. P. Wilde refused, in *Goods of Mary Reid*,[1] to give effect to a paper prepared after the will, though it was apparently sufficiently described in the will and was followed by a good codicil. But in most cases the rule of *Goods of Truro* would probably lead to the same result as the test here suggested.

## RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the courts. No pains are spared in selecting *all* the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

AGENCY — IMPLIED POWER — EXTRINSIC FACT. — Where an agent has authority to borrow money on exceptional terms in cases of emergency, the lender is not bound to inquire whether the emergency has actually arisen; but if he acted in good faith and without notice that the agent has exceeded his authority, he can recover from the principal. *Montaignac* v. *Shitta*, 15 App. Cas. 357 (Eng.).

The principle of this case would seem to be that where the agent is empowered to act on the existence of an extrinsic fact the principal is bound by the agent's representation as to the existence of that fact when it is peculiarly within the agent's knowledge. If so the case would be contrary to *Grant* v. *Norway*, 10 C. B. 665, and in accord with *N. Y. & N. H. R. R. v. Schuyler*, 34 N. Y. 30.

BILLS AND NOTES — PAROL EVIDENCE. — Parol evidence is admissible to show that a demand promissory note made by a daughter to her father was in fact executed under an agreement that it should never be enforced, but should serve as a mere memorandum of an advancement. *Brook* v. *Latimer*, 24 Pac. Rep. 946 (Kan.).

CONSPIRACY — MALICE. — An action will lie for a combination or conspiracy to drive a trader out of business by fraudulent and malicious acts. The gravamen of a civil action is malice, conspiracy being matter of inducement only. *Van Horn* v. *Van Horn et. al.*, 20 Atl. Rep. 485 (N. J.).

*Mogul Steamship Co.* v. *McGregor*, 23 Q. B. D. 598, was cited and approved.

CONSTITUTIONAL LAW — EQUAL PROTECTION. — The allowance of the right of appeal to citizens of the State at large in all cases of conviction of crimes before a justice of the peace, and a denial of such right to citizens of Detroit, convicted of similar offences in the police court of that city, where the sentence imposed does not exceed twenty days imprisonment or a $25 fine, does not deprive citizens of Detroit of the equal protection of the laws guaranteed to all citizens of the United States by the Constitution, Amendment 14, § 1, as the act providing for appeals from the police court of Detroit operates equally on all persons within its jurisdiction. *Sullivan* v. *Hang*, 46 N. W. Rep. 795 (Mich.).

CONSTITUTIONAL LAW — POLICE POWER — INTOXICATING LIQUORS. — A San Francisco ordinance provided that one seeking a liquor-dealer's license must first obtain the written consent of a majority of the police commissioners, and in case of a refusal in the first instance, such consent was to be given upon the written recommendation of not less than twelve citizens owning real estate in the block in which the business was to be carried on. *Held*, the ordinance was constitutional. *Crowley* v. *Christensen*, 11 Sup. Ct. Rep. 13. See note on this case *supra*, p. 236.

CONTRACTS — INTERPRETATION — CHARTER-PARTY. — By the charter-party the charterer contracted to pay demurrage for delays over and above the lay-days allowed, and the owner agreed to render all customary assistance in unloading. The lay-days were exceeded on account of a strike by the dock laborers employed

[1] 38 L. J. N. S. (P. & M.) 1; 4 Gray's Cas. Prop. 223.

by the stevedores of both parties. The jury, on this evidence, found that the shipowners were not "ready and willing to do their part of that which it was customary for them to do." *Held*, that nevertheless the shipowner was entitled to demurrage. The obligation of the consignee to pay demurrage is absolute. The readiness and willingness of the master to do his part is not a condition precedent or concurrent. The consignee is liable unless he was prevented from unloading by the act of the master. *Budgett & Co.* v. *Binnington & Co.*, 39 W. R. 13 (Eng.).

CORPORATIONS — RESIGNATION OF DIRECTOR. — Where the charter contains nothing in regard to the resignation of directors, they contract to serve until their resignation is accepted by the company, and cannot be free from their office merely by tendering their resignation. *It seems* also that the board of directors, with general power to manage the company's affairs, have no implied power to accept such resignation. *Municipal Land Co.* v. *Pollington*, 63 L. T. Rep. N. S. 238 (Eng.).

CRIMINAL LAW — CONSTRUCTION OF STATUTES. — The selling liquor to a minor on his representation that it is needed for his sick mother's immediate use, but without a written order, though within the letter, is not within the spirit, of Pen. Code Tex. art. 376, which makes it a misdemeanor for any person to knowingly sell liquor to a minor without the written consent of his parent or guardian. *Waldstien* v. *State*, 14 S. W. Rep. 394 (Tex.).

CRIMINAL LAW — EVIDENCE OF ACCOMPLICES. — It is a general rule of practice to advise a jury not to convict on the uncorroborated testimony of an accomplice, but it is not error to refuse to do so. *Com.* v. *Wilson*, 25 N. E. Rep. 16 (Mass.).

EQUITY JURISDICTION — STATUTE OF LIMITATIONS — FRAUD. — A plaintiff sues in equity because he is barred at law, and claims that he is barred at law by reason of having failed to bring suit in time, and that his failure to bring suit in time was caused by the fraudulent conduct of defendants. *Held*, that, as the fraud charged is collateral to the plaintiff's cause of action (contract) and not the foundation of the suit, equity will afford no relief. *Jaffrey* v. *Bear*, 42 Fed. Rep. 571.

INSOLVENCY — ASSETS — ALABAMA CLAIMS. — The assignee of one who made an assignment in bankruptcy before 1871 is not entitled to the sum paid the assignor for "war premiums" out of the residue of the Geneva Award. Such claims were expressly excluded from the award by the commissioners, therefore it cannot be said that at the time of his assignment the assignor had any right against Great Britain or the United States. *Taft* v. *Marsily*, 24 N. E. Rep. 926 (N. Y.).

INSOLVENCY — FRAUDULENT CONVEYANCES. — Where one of the terms of the sale of his business by an insolvent debtor is that he is retained in the management thereof at a salary, there is a benefit secured to him which renders the transaction fraudulent as against creditors. *Stephens* v. *Reginstein et al.*, 8 So. Rep. 68 (Ala.).

LIBEL — CRIMINAL PROSECUTION. — The following false words were published by a newspaper: "It is now almost forgotten that Governor Haney pardoned his own brother out of the penitentiary." *Held*, that they constituted a libel for which a criminal prosecution could be maintained. It is enough in a criminal action that the alleged libellous words were directed against a family. *State* v. *Brady*, 24 Pac. Rep. 948 (Kan.).

LIEN — INNKEEPER — MARRIED WOMAN'S SEPARATE PROPERTY. — Where a husband and wife stay together at a hotel, and the husband is the sole contracting party to whom credit is given, the separate property of the wife is not liable for the unpaid balance of the hotel charges; but the innkeeper has his lien on the wife's goods and luggage, because he was as much compelled to receive them as the husband's goods. *Gordon* v. *Silber*, 25 Q. B. D. 491 (Eng.).

LOSS OF CONSORTIUM. — A wife cannot maintain an action against another woman for debauching her husband. *Doe* v. *Roe*, 20 Atl. Rep. 82 (Me.).

A similar decision was reached lately in Wisconsin (45 N. W. Rep. 523). But see *Westlake* v. *Westlake*, 34 Ohio St. 621, and *Lynch* v. *Knight*, 9 H. of L. Cas. 577, *contra*.

MEASURE OF DAMAGES. — In an action against a town for injuries resulting

from a defective highway, it appeared that the plaintiff, after having so far recovered from his injuries (a broken leg) as to be able to be about on crutches, had his leg broken a second time by an accident to a carriage in which he was riding. The court instructed the jury that if there was no negligence on the part of the plaintiff contributing to the second accident, and if the injury would not have occurred except for the weakened and impaired condition of his leg resulting from the previous accident, in contemplation of law the second breaking would be a direct consequence and result of the previous accident, for which the plaintiff could recover damages. *Held*, that the instructions were correct. *Weiting* v. *Millston*, 46 N. W. Rep. 879 (Wis.).

PROPERTY — APPORTIONMENT — INCOME. — The X. Company divided a portion of a reserve fund created by setting aside from time to time a portion of the current profits. *Held*, that, as between tenant for life and remainder-man under a settlement, this must be considered income, although a portion of the fund came from profits earned and set aside in the testator's lifetime. *In re Alsbury*, 45 Ch. D. 237 (Eng.).

This case follows *Bouch* v. *Sproule*, 12 App. Cas. 385, which, in deciding that a given payment was capital, laid down the principle that a reserve fund like this was either capital or income, as the company chose to treat it. Previous to this case the authorities were conflicting, and there was an impression that such a fund was capital.

QUASI CONTRACTS — SUPPORT OF PAUPER. — The plaintiff furnished a pauper with necessaries which the defendant was legally bound to provide. The defendant had already been notified by the plaintiff of the destitute state of the pauper. *Held*, that the plaintiff could recover from the defendant on the ground of an implied promise to pay for the necessaries supplied. *Eckman* v. *Township of Brady*, 45 N. W. Rep. 502 (Mich.).

REAL PROPERTY — COVENANTS RUNNING WITH THE LAND. — The owner of land covenanted to give the covenantee one-eighth of the lead ore mined by him on his land. *Held*, that the parties were tenants in common of all the ore in the land, and that the covenant was binding upon the devisee of the covenantor. *Crawford* v. *Witherbee*, 46 N. W. Rep. 545 (Wis.). The conclusion reached in this case, that the burden of the covenant would run, was right; but it would seem that the reasoning of the court was erroneous. If it were true that the parties became tenants in common, the covenant would not run. But if upon a true construction of the deed the covenantee simply obtained a right of profit in the land, the decision would be correct; for, according to the American authorities, a covenant in aid of a profit will bind the assignee of the covenantor. See *Morse* v. *Aldrich*, 19 Pick. 449.

REAL PROPERTY — ESTOPPEL. — An heir-apparent conveyed the land of her ancestor by a warranty deed, and died in the lifetime of her ancestor, leaving children. *Held*, that on the death of the ancestor the land would go to the children, and would not pass to the grantee by estoppel. The children take the land as heir of the ancestor, and not of the grantor. *Habig* v. *Dodge*, 25 N. E. Rep. 182 (Ind.).

REAL PROPERTY — POSSESSION OF TENANT — NOTICE TO VENDEE. — The possession of land by a tenant is sufficient notice of the landlord's title under an unrecorded deed to put a purchaser on inquiry. *Levy* v. *Holberg*, 7 So. Rep. 431 (Miss.).

REPLEVIN — DEPRECIATION PENDING APPEAL. — The plaintiff brought replevin for bonds which the defendant, by giving security, retained in his possession during the trial. The plaintiff got judgment for the bonds and, under a provision of the code, for the depreciation up to the date of the judgment. The defendant appealed and the judgment was affirmed. This action was brought to recover the loss due to depreciation between the date of the judgment and the final affirmance. *Held*, the action would not lie. *Corn Exchange Bank* v. *Blye*, 25 N. E. Rep. 208 (N. Y.).

SALES — WARRANTY. — Vendor of a horse gave a written warranty that the horse was registered in the Stud Book of England. *Held*, in an action for the failure of this warranty, that the seller could not show, by parol evidence, that prior to the sale he had informed the purchaser that the horse was not registered. *Watson* v. *Roode*, 46 N. W. Rep. 491 (Neb.).

SLANDER — WORDS ACTIONABLE PER SE. — A Catholic priest told his congregation that the plaintiff, a physician, had been excommunicated; that therefore they should not employ him; and if they did they could not have the ministrations of the priest while he was under their roof. *Held*, that the words were actionable *per se*, as they affected the plaintiff in his capacity as a physician. *Morasse* v. *Brochu*, 25 N. E. Rep. 74 (Mass.).

STATUTE OF LIMITATIONS — OFFSETTING DEBTS AGAINST LEGACIES. — The debts due testator by legatees cannot be set off against legacies, if the period of limitation has run before time of distribution.

The allowance of a dividend on the debts, by the debtors' assignee, for benefit of creditors, does not arrest the statute after it has begun to run, for the assignee is not the agent of the debtor. *In re Light's Estate*, 20 Atl. Rep. 536 (Pa.).

TRUSTS — CHARITABLE BEQUEST — CERTAINTY. — A bequest as follows: "And the rest, if there be any, [I give] to such charitable purposes as my said trustee may deem best," — is sufficiently definite, and will be carried into effect. *Powell* v. *Hatch*, 14 S. W. Rep. 49 (Mo.).

TRUSTS — STATUTE OF LIMITATIONS. — Where one having stock standing in his name sells it to another, and gives a receipt for the money, reciting that it is the first instalment on a certain number of shares of the stock, "standing in my name, but owned by him, and he remaining responsible for the balance of the instalments when called in," but containing no agreement as to the future disposition of the stock or the dividends therefrom, the transaction raises an implied trust against which the Statute of Limitations will run. *Cone et al.* v. *Dunham*, 20 Atl. Rep. 311 (Conn.).

WILLS — CONSTRUCTION. — Where a will creates a valid trust and names a trustee, the trustee takes the legal title to the trust estate although there are no word of gifts to him. *Toronto Co.* v. *R. Co.*, 25 N. E. Rep. 198 (N. Y.).

WILLS — CONSTRUCTION. — In the draft of the will the word "including" on page 1 was changed at the testator's direction to "excluding." In the copy which the testator executed the word "including" on page 1 was left standing, and "including" on page 12 changed to "excluding." *Held*, that "excluding" on page 12 could be altered back, but that no alteration could be made on page 1. *Goods of Huddleston*, 63 L. T. Rep. N. S. 255 (Eng.).

This decision, it would seem, can only be supported on the theory of dependent relative revocation. This case seems an extreme application even of that doctrine. It was, however, an uncontested case.

WILLS — CONSTRUCTION. — A testator gave an annuity to A., and from and immediately after her death to such child or children of hers as should attain twenty-one. But if A. died "without leaving any such child," he gave the annuity to others. A. died without leaving any children, but had had a child who attained twenty-one in her lifetime. *Held*, that the representatives of the deceased child take nothing. Where there has been a vested interest in a capital sum, the court has construed "leaving" as if written "having had," to avoid taking away that vested interest. But an annuity is a personal provision, and this doctrine has never been applied to it. *In re Hemingway*, 63 L. T. Rep. N. S. 218 (Eng.).

WILLS — CONSTRUCTION — REMAINDERS. — Testator divised his residuary estate to trustees "during the life of my son D.," in trust for said D., and "after the death of said D. I give and bequeath all the property affected by the above trust to my own right heirs." *Held*, that an estate in remainder vested on testator's death in D., his only heir, so that on D.'s death the estate went to his heirs, and not to those who were then the testator's heirs. *In re Kenyon et. al.*, 20 Atl. Rep. 294 (R. I.).

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# REVIEWS.

THE VETO POWER: ITS ORIGIN, DEVELOPMENT, AND FUNCTION IN THE GOVERNMENT OF THE UNITED STATES. By Edward Campbell Mason. Edited by Professor Albert Bushnell Hart. Boston, 1890: Ginn & Co. 8vo. Pages 230.

The present monograph is the first of the series entitled "Harvard Historical Monographs," and is an exposition and discussion of the veto power as it is found in the Constitution of the United States.

The first chapter is an attempt to prove historically that the veto power, as its nature would indicate, and as various constitutional writers have intimated, is a part of the legislative power of the government. The idea is carefully worked out, and makes one of the most interesting chapters in the monograph.

The body of the work is taken up with a discussion of the presidential vetoes. These have been classified according to the subject-matter of the bills vetoed. For example, we find all the tariff vetoes grouped together under the general head of "financial vetoes." By this arrangement the discussion will be of use not only from the point of view of the veto power, but will also be of assistance in any study of the various subjects touched upon.

Perhaps the most striking fact in the book is the number and character of President Cleveland's vetoes. They are more than twice as numerous as those of all his predecessors together, and they were in most cases imposed on pension bills. The expediency and constitutionality of these pension vetoes has been dwelt on at some length, and in the opinion of the author they were justified from both points of view.

Chapters V. and VI. are more likely to be generally read than any others in the work, for they give the author's conclusions on various political and constitutional questions raised by the use of the veto power.

The plan evidently has been to make any fact in the book and all related facts easily accessible; for the table of contents and index are full and conveniently arranged, while foot-notes, cross-references, and appendices are numerous and as complete as possible. Some of the appendices, as, for example, the list of vetoes and the legislative activity of the Presidents, are of great value.

The work as a whole impresses one as being well conceived and skilfully executed. It is clear, and for the most part concise, although some points have been dwelt on with rather more fulness than seems necessary. It is, in short, a book which workers in history will appreciate gratefully. G. C.

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THE SUPREME COURT OF THE UNITED STATES. By Westel. W. Willoughby. Johns Hopkins University Studies. The Johns Hopkins Press, Baltimore, 1890. 8vo. Pages 124.

The work gives a short, concise statement of the origin and conception, the establishment and the history, of the Supreme Court of the United States. The functions and powers of the court are well brought out by discussion of the leading cases decided by it. The relations of the court to Congress, to the Executive, and to the State legislatures and judiciaries are treated of in separate chapters. The part the court has played in politics and its present pressing needs are pointed out. The work is a useful one for the general reader, and contains many useful hints for the student. L. H.